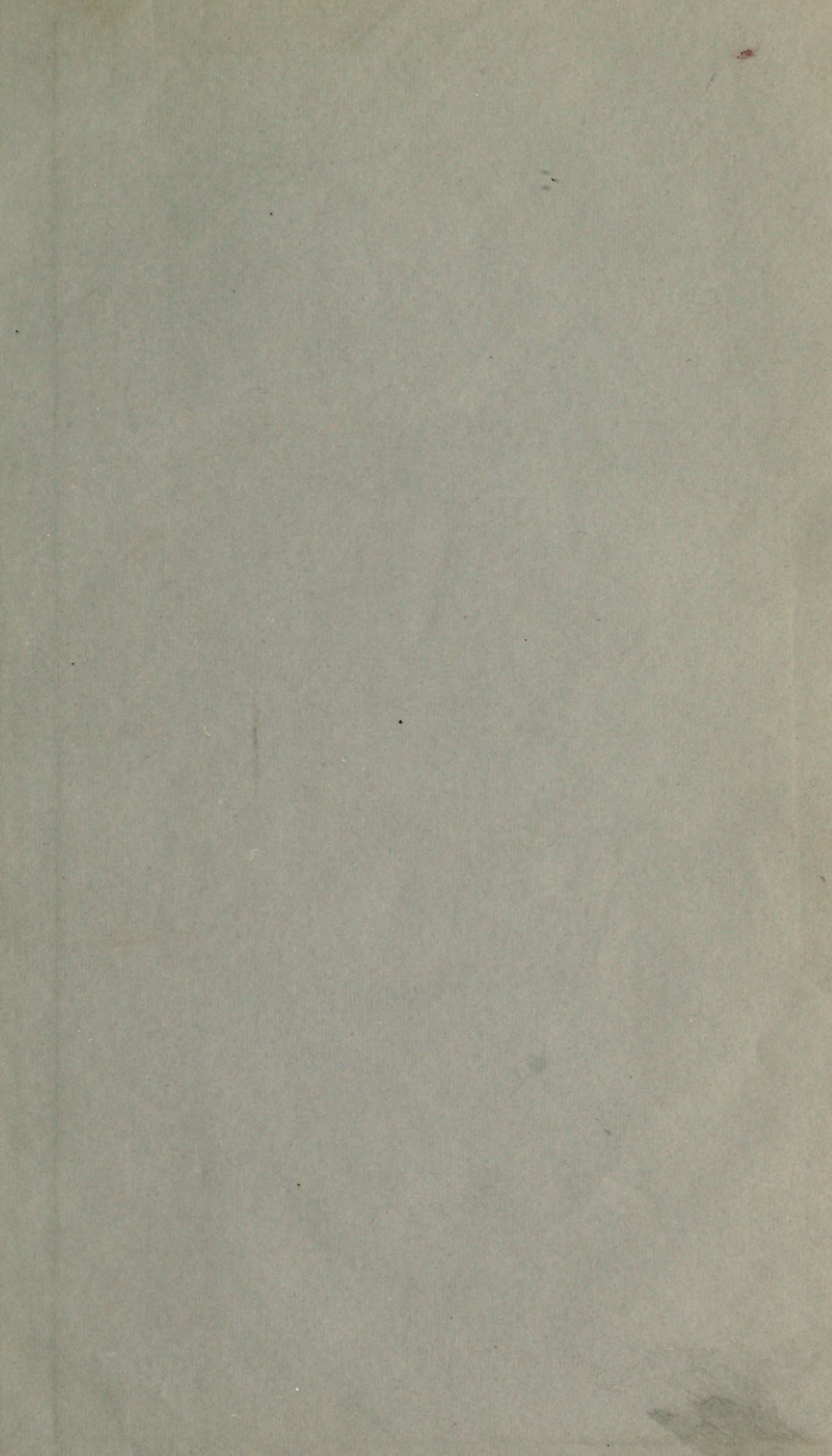




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THE

PUNJAB RECORD

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT, AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

REPORTED BY

C. H. OERTEL, BARRISTER-AT-LAW.

VOLUME XLIV.

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HON. SIR ARTHUR REID, KT., *Chief Judge from 14th January 1909. (On leave from 22nd May 1909 to 18th August 1909.)*

JUDGES :

HON. MR. JUSTICE F. A. ROBERTSON, (*Offg. Chief Judge from 22nd May 1909 to 18th August 1909.*)

„ „ „ A. KENSINGTON. (*On leave from 19th April 1909.*)

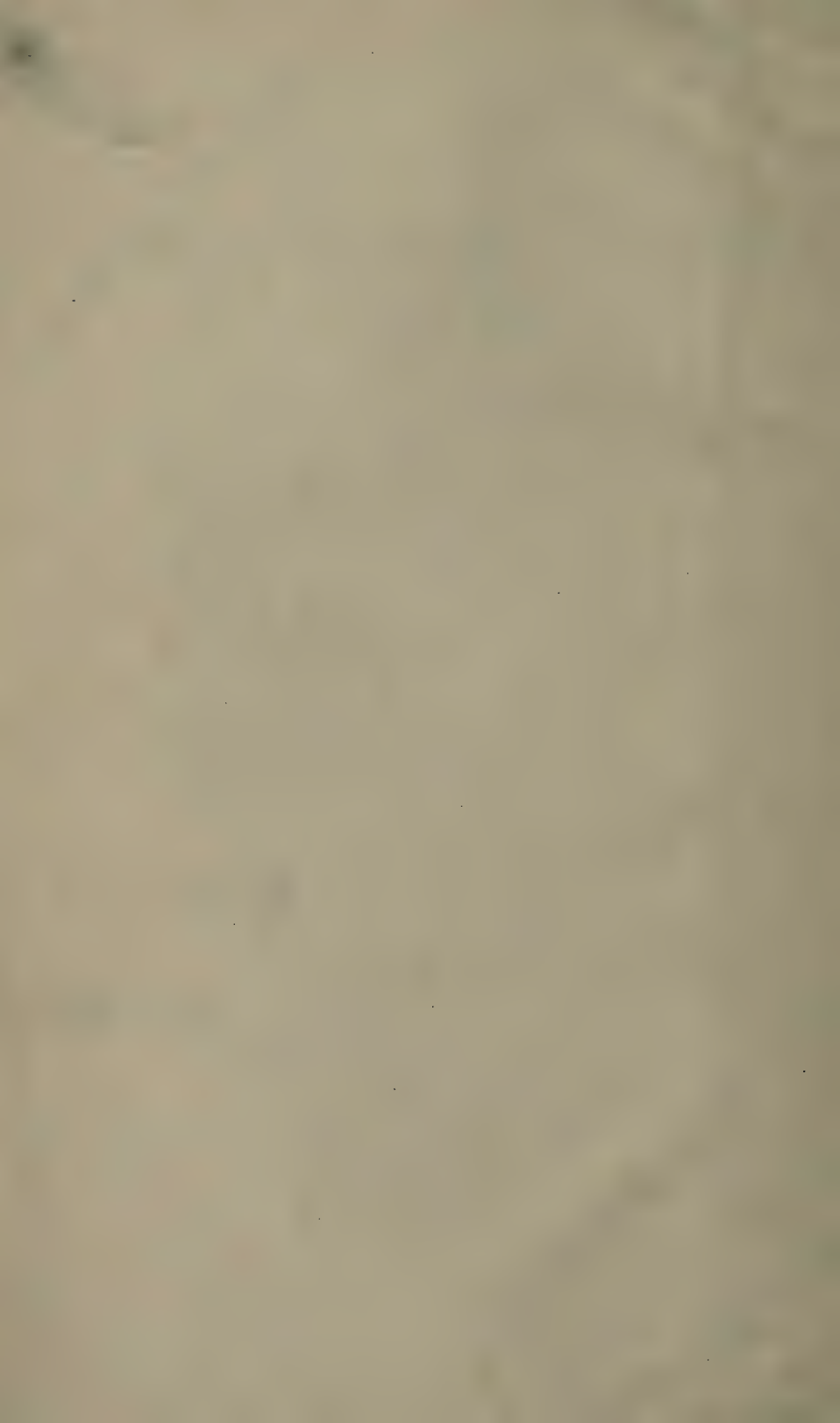
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1. Absentees having failed to prove that during the last 40 years they have had any connection with the land or shared its profits, the defendants have acquired title by adverse possession.

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See *Negotiable Instruments Act*, 1881 ... No. 71 P. R. 1909.

BRAHMANS.

1. *Village Rawal, District Rawalpindi—governed by custom.*

See *Custom—Succession* (17) ... No. 56 P. R. 1909.

Brahmans of mauza Charori, Dakhli Majara, tahsil Nurpur of Kangra District, are governed by custom.

See *Custom—Succession* (21) ... No. 87 P. R. 1909.

BROTHER.

A brother of the husband of the adopting widow may be adopted among Jains of Delhi.

See *Custom—Adoption* (3) ... No. 95 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

BURDEN OF PROOF.

1. Collateral succession by adopted son.

See *Custom—Succession* (18) ... No. 61 P. R. 1909.

2. Gift to a pichhlag.

See *Custom—Alienation* (10) ... No. 63 P. R. 1909.

C

CANTONMENTS HOUSE ACCOMMODATION ACT, 1902.

SECTION 28

and sections 21, 26, 34—*Military tenant to require reference to arbitration—Constitution of Committee of Arbitration—Authority of District Magistrate to appoint a member in place of a nominee of a party—Finality of the decision of a Committee improperly constituted.*—Held, that a District Magistrate has no right to appoint a member of a Committee of Arbitration under section 28 of the Cantonments House Accommodation Act, 1902, in the place of a nominee of a party who had declined to act on the ground of unsuitability of the time fixed for the meeting, but was willing to act if another date was fixed, without first calling upon the party concerned to nominate another member in his place, and the latter had failed to do so within the period allowed to him by law.

A Committee of Arbitration constituted in violation of the provisions of the Act has no legal existence and no powers of a Committee of Arbitration, and its actions are simply *ultra vires* and must be disregarded by Courts of Law.

Query.—Is it competent to convene a Committee of Arbitration under the Act when the requisition comes from a Military Officer who is not a tenant but intends to lease?

... No. 13 P. R. 1909.

CAUSES OF ACTION.

1. Misjoinder of—Not a ground for appeal.

See *Civil Procedure Code, 1882* (2). ... No. 93 P. R. 1909, P. C.

2. Conditional decree for possession on payment of a certain sum of money does not create a new cause of action.

See *Limitation* (3) ... No. 100 P. R. 1909.

CHIEF COURT CIRCULAR ORDER LVII.

Security taken on revision, extent of.

See *Execution of Decree* (2) ... No. 66 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CHRISTIANS.

Native.

See *Converts*. ... No. 36 P. R. 1909.

CHUNDAVAND OR PAGVAND.

See *Custom—Succession* (2) ... No. 5 P. R. 1909.

CIVIL PROCEDURE CODE, 1882.

1. *Sections 17 and 18—Meaning of words "actually and voluntarily resides."*

See *Jurisdiction* (4) ... No. 77 P. R. 1909.

2. *Civil Procedure Code, 1882, sections 31 and 578—Misjoinder of causes of action—No ground for appeal—Power of Court to refuse to entertain pleas raised too late—Estoppel—Custom—Widow's alienation—Effect of consent of collaterals—Adoption of daughter's son.*

Held, that though by strict Hindu Law a daughter's son cannot be adopted, this general rule may be varied by family custom, and often is so varied in the Punjab.

Held also, that the District Court was right in refusing to entertain a new plea challenging the validity of an adoption (the solution of which must be dependent upon evidence), when it was put forward at the very last stage of the hearing after all the evidence was closed.

Held also, that a widow cannot by deed provide for the descent of property (which she has inherited from her husband) after her death, in a line different from that prescribed by law either with or without the consent of reversioners.

Held also, that the plaintiffs claiming title from an adopted son are not estopped by reason of their father having signed a sale-deed as a witness, made by the widow of the adopted son and the latter's mother, in which they claim title derived from the adoptive father and from the collaterals of the adoptive father and not from the adopted son.

Held also, that it is doubtful whether upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there is a misjoinder of causes of action in a suit, when plaintiffs as reversioners sue for a declaration in one suit in regard to several alienations made by widows.

And further, that section 578 of the Code of Civil Procedure has the effect of preventing such a defect of misjoinder from being made a ground of appeal.

... .. No. 93 P. R. 1909 P. O.

The references are to the Nos. given to the cases in the "Record."

CIVIL PROCEDURE CODE, 1882—(contd.).

3. SECTION 98

and sections 99, 623—Dismissal of suit for default—Failure of plaintiff to avail himself of the provisions of section 99—Review of judgment.

See *Review* No. 33 P. R. 1909.

4. SECTION 266, CLAUSE (c).

Civil Procedure Code, 1882, section 266, clause (c)—Meaning of—Attachment of an unused khurli.—Held, that the words "belonging to" in clause (c) of section 266, Civil Procedure Code (1882), are not synonymous with the words "occupied by"; the latter words are not a mere repetition, but they qualify the former words. "Occupied by" means "lived in by" or "used for agricultural purposes by," and therefore a khurli, in which the judgment-debtor does not live and which at the time of attachment was not being used by him for any purpose whatever, is liable to attachment.

... .. No. 65 P. R. 1909.

5. SECTION 268.

Civil Procedure Code, 1882, section 268—Attachment—Mortgage debt—Movable or immovable property.—Held, that for the purposes of section 268 of the Code of Civil Procedure a debt secured by a mortgage lien on land is not immovable but movable property.

... .. No. 18 P. R. 1909.

6. SECTION 278.

and section 283—Attachment—Application for removal of attachment—Omission of Judge to give decision with respect to a part of the property under attachment—Suit by claimant to establish right regarding the part so omitted—Limitation.

See *Indian Limitation Act, 1877, Article 11 (6).* No. 42 P. R. 1909.

7. SECTION 336.

See *Arrest* No. 16 P. R. 1909.

8. SECTION 433.

See *Jurisdiction (1)* No. 21 P. R. 1909.

9. *Sections 525 and 522—Application under section 525—Premature if award had not been pronounced at date of application—Appeal lies in such a case although decree passed in accordance with award.—Held, that an application for filing an award under section 525, Civil Procedure Code, 1882, should be dismissed as premature and must fail, where the award had not been pronounced orally or reduced to writing at the time of the application.*

The references are to the Nos. given to the cases in the "Record."

CIVIL PROCEDURE CODE, 1882—(concl'd.).

Held also, that notwithstanding that the Court of first instance passed a decree in accordance with the award, an appeal lay to the District Court, as the first Court had dealt with an application which it had no power to entertain and which it should have rejected, immediately the fact was made known to it, that the award was not in existence at the date of presentation of the application.

Bhagwan Singh v. Mussammat Ram Kaur (No. 38 P. L. R. 1906 distinguished).

... .. No. 80 P. R. 1909.

COLLATERALS.

1. Land originally gifted to son-in-law for benefit of daughter and her issue reverts to donor's family. *Collaterals* of son-in-law have no *locus standi* to contest an alienation of it.

See *Custom—Alienation* (13) No. 102 P. R. 1909.

2. *Locus standi* of distant collaterals to contest gift to *pichhlag*.

See *Custom—Alienation* (10) No. 63 P. R. 1909.

3. Near collaterals excluding daughters in inheritance among Brahmans of *mauza* Rawal in the Rawalpindi District.

See *Custom—Succession* (17) No. 56 P. R. 1909.

4. Near collaterals excluding daughter in inheritance among Agarwal banias, Ludhiana city.

See *Custom—Succession* (19) No. 68 P. R. 1909.

5. Succession of—in presence of an adopted son.

See *Custom—Succession* (18) No. 61 P. R. 1909.

COMPENSATION.

Suit for—against Municipal Corporation—Period of limitation.

See *Indian Limitation Act, 1877* (5) No. 72 P. R. 1909.

CONDITIONAL DECREE.

For possession on payment of a sum of money does not create a mortgage or new cause of action.

See *Limitation* (3) No. 100 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CONSENT.

By adult female is necessary under Muhammadan Law to her marriage.

See *Marriage* (2) No. 73 P. R. 1909,
and *Betrothal contract* No. 83 P. R. 1909.

CONTRACT.

Competency of minor to sue for breach of his betrothal made by his father.

See *Right of Suit* No. 3 P. R. 1909.

CONTRACT ACT, 1872.

SECTION 231.

An undisclosed principal can take advantage of any contract made for him by his agent.

See *Negotiable Instruments Act*, 1881 No. 71 P. R. 1909.

CONTRACT OF MARRIAGE.

Is a Civil Contract under Muhammadan Law.

See *Marriage* (2) No. 73 P. R. 1909.

CONVERTS.

Native Christian—Hindu convert to Christianity—Rule of succession—Hindu Law or Indian Succession Act, 1865—Evidence of custom—Justice, equity and good conscience—Partition of joint immovable property—Authority of Courts to give money decree in lieu of share—Partition Act, 1893.—Held, that the rule of law to regulate succession in the case of a Hindu convert to Christianity should be determined by ascertaining the course of his conduct and the usages adhered to by him since his conversion, and therefore where it appeared that he and his family had severed all connection with Hindu Society and in matters relating to social intercourse, marriages and the similar usages, abandoned all caste distinctions and had thoroughly identified themselves with the members of the religion of their adoption, it is in accordance with justice, equity and good conscience to apply to them the rules of inheritance prescribed by the Indian Succession Act, 1865.

Held also, that in a suit for partition of joint immovable property the Court has no authority in the absence of an application under Act III of 1893, to grant a mere money decree in lieu of a definite share to the claimant.

... .. No. 36 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM.

Strict rule of Hindu Law against the adoption of daughter's son is often varied in the Punjab by family custom.

... .. No. 93 P. R. 1909, P. C.

CUSTOM—ADOPTION.

1. *Custom—Adoption—Adoption of a distant married collateral in presence of near collateral—Lohars of tahsil Amritsar.—Found, that among Lohars of tahsil Amritsar the adoption at the age of 26 of a married man, with children, is not invalid by custom.*

... .. No. 49 P. R. 1909.

2. *Custom—Adoption by widow without husband's authority—Succession—Exclusion of daughter by collaterals—Agarwal banias, Ludhiana city.—Held, that among Agarwal banias of Ludhiana city who are not Jains, an adoption by a widow could not be effected, without the authority of her husband.*

... .. No. 68 P. R. 1909.

3. *Custom—Adoption—Jains of Delhi—Widow's power to adopt—Ceremonies and publication—Age of adopted son—Married man may be adopted—Also brother of widow's husband.—Held, that by special custom among Jains—*

(a) adoption is a purely secular transaction without any religious meaning,

(b) a sonless widow may adopt without any authorisation of her husband,

(c) no special ceremonies are necessary, all that is required is consent on both sides and due publication by some means recognized among the brotherhood,

(d) the distribution of *ladus* is sufficient publication in Delhi,

(e) there is no limit to the age of the adopted son,

(f) a married man with children may be adopted and so may a brother of the husband of the adopting widow, and

(g) that it has not been proved that the adopted son must be younger than the adopting widow.

... .. No. 95 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—ALIENATION.

1. *Onus probandi as to the inapplicability of Punjab Limitation Act, 1900, to a suit by a reversioner of a male proprietor to recover possession of ancestral land alienated by such proprietor.*

See *Punjab Limitation Act, 1900* (1).

... .. No. 11 P. R. 1909.

2. *Custom—Alienation—Will—Competency of a childless proprietor to make a will in favour of distant collaterals in presence of near agnates—Chiman Jats of Rawalpindi District.—Found, that by custom among the Chiman Jats of Rawalpindi District, a bequest of ancestral property by a sonless proprietor in favour of distant collaterals is invalid in the presence of his near agnates.*

... .. No. 4 P. R. 1909.

3. *Custom—Alienation—Sale by male proprietor—Kashmiris of mauza Panjorian, Gujrat District.—Burden of proof.—Held, that the plaintiff, upon whom the onus lay, had failed to establish that in matters of alienation the Kashmiris of mauza Panjorian in the Gujrat District were governed by custom and not by Muhammadan Law.*

... .. No. 17 P. R. 1909.

4. *Sale by limited owner.—Failure to prove payment of the whole of the consideration.—Maintainability of such sale.*

See *Sale* No. 27 P. R. 1909.

5. *Gift of occupancy rights to daughter in presence of near male collaterals.—Chimas of mauza Bhama Kalan in the Lahore District.—Burden of proof.*

See *Occupancy Rights* No. 38 P. R. 1909.

6. *Custom—Alienation—Gift and will in favour of a daughter or daughter's son—Muhammadan Dab Jats of Jhang District.—Found, that the defendant failed to prove that among Muhammadan Dab Jats of Jhang District, a sonless male proprietor is competent to transfer, either by gift or will, ancestral immovable property to a daughter or daughter's son, or that the daughter or daughter's son was entitled to succeed in preference to the first cousins once removed of the deceased.*

... .. No. 48 P. R. 1909.

7. *Custom—Alienation—Gift to one son in excess of his share—Sials of Jhang District.—Held, that a gift of land by a Sial of the Jhang District to one son in excess of his ordinary share in order to equalise the shares of his sons is not ordinarily void.*

... .. No. 50 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—ALIENATION—(contd.).

8. *Custom—Alienation—Hindu law—Saihgai Khatri of Jullundur city.—Held*, that Saihgai Khatri, though owning some land in Jullundur city, are not governed by agricultural customs in matters of alienation but by Hindu Law.

Also that, the initial presumption in regard to Khatri is that they follow Hindu Law and not agricultural customs.

... .. No. 58 P. R. 1909.

9. *Custom—Mortgagee's rights—Right of mortgagee's heirs to contest alienation of those rights.—Held*, that for the purpose of the Customary law of this Province mortgagee's rights do not amount to such rights in the land charged as would give the mortgagee's heirs a right to contest an alienation of those rights.

... .. No. 59 P. R. 1909.

10. *Custom—Alienation—Gift by sonless proprietor to pichhlag—Locus standi of distant collaterals to contest its validity—Gondals of mauza Isar, tahsil Bhera, district Shahpur.—Held*, among Gondals of mauza Isar, tahsil Bhera, district Shahpur, that having regard to the fact that the village community is a compact body of proprietors all descended from one common ancestor, that the tribal custom of the Shahpur district is against the gift, and that the donee as a *pichhlag* is a perfect stranger to the donor, collaterals in the eighth degree from the donor, a sonless proprietor, have a *locus standi* to contest the gift and the *onus* of proving that the gift is valid by custom lies on the donee.

Held also, that the donee had failed to prove that the gift is valid by custom.

... .. No. 63 P. R. 1909.

11. *Custom—Alienation—Status of alienee of reversionary rights to contest an alienation.—Held*, that a reversioner's right to contest an alienation under Customary law is not transferable to a stranger and *ergo* that where a reversioner, who has succeeded after the death of a widow, alienates his reversionary rights, the alienee has no *status* to contest the validity of mortgages made by the widow.

... .. SHER SINGH v. SIDHU, 11 P. R. 1907 overruled.

... .. No. 67 P. R. 1909.

12. *Custom—Hindu law—Alienation by childless proprietor—Sodhi Khatri of mauza Hardo Jhanda, tahsil Batala, district Gurdaspur—Onus probandi.—Held*, that among Sodhi Khatri of mauza Hardo Jhanda, tahsil Batala, district Gurdaspur, the *onus* of proving that they follow agricultural custom in regard to alienations is on the person alleging it.

... .. No. 79 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—ALIENATION—(concl.).

13. *Custom—Alienation—Land originally gifted to son-in-law for benefit of daughter and her issue reverts to donor's family—Reversioners of son-in-law have no locus standi to contest an alienation of it.*

The land in dispute originally belonged to one Jiwan, who gifted it to his son-in-law Mulayam for the benefit of his daughter and her son Pira. Pira died, leaving a daughter Mussammat Kako and in his lifetime made a gift of the said land to Maula Bakhsh, Mussammat Kako's son. After Pira's death the daughter sold the land to collaterals of the said Jiwan. Plaintiffs, the collaterals of Pira, brought the present suit to contest the alienation claiming to be reversioners. An objection as to their *locus standi* was raised by the defendants—

Held, that the land came to Pira through his mother, that is, he held it as a daughter's son. He does not constitute a fresh stock of descent *qua* the land, which throughout its course of devolution, whether by inheritance or gift, retains its original character as property that has gone down from Jiwan to Mussammat Kako, therefore the plaintiffs as collaterals of Pira have no *locus standi* to contest the sale in the presence of the collaterals of Jiwan.

... ..

No. 102 P. R. 1909.

CUSTOM—INHERITANCE.

See *Custom—Succession*.

CUSTOM—MARRIAGE.

Marriage—Validity of a chadar andazi marriage between a Minhas Rajput and a Mahajan woman of Gujrat district—Legitimacy of children of such marriage—Held, that a chadar andazi marriage between a Minhas Rajput and a Mahajan woman of the Gujrat district is valid, and the son of such a marriage is entitled to succeed to the estate of his deceased father.

... ..

No. 57 P. R. 1909.

CUSTOM—PRE-EMPTION.

Custom—Pre-emption—Jullundur city, "Khatra Jua Khana" sub-division.—Held, that the so called "Khatra Jua Khana" is not a separate sub-division of Jullundur city, for purposes of pre-emption.

Held also, that in the old city of Jullundur pre-emption is general.

... ..

No. 70 P. R. 1909.

CUSTOM—RELIGIOUS INSTITUTIONS.

Custom—Religious institutions—Darbar Sahib, Amritsar—Adopted son—Succession to rozina dues—Hindu Law not applicable.

Held, that an adopted son does not come under clause (b) of the *Dastur-ul-Aml* of Darbar Sahib, Amritsar, and therefore cannot succeed to the rozina dues of the said institution; the matter is not one to be decided under Hindu law but under the custom and practice of the institution.

... ..

No. 94 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—SUCCESSION.

1. *Custom—Inheritance—Right of daughter to inherit self-acquired land in presence of near male collaterals—Hindu Rajputs of Kangra district.—Found, that defendant had failed to prove that by custom among Hindu Rajputs of the Kangra district near male collaterals were entitled to succeed to the self-acquired property of a sonless proprietor held by him in a different village in preference to his daughter.*

... .. No. 2 P. R. 1909.

2. *Custom—Inheritance—Pagvand or chundavand—Sarai Jats of Dholpur, tahsil Batala, Gurdaspur district.—Found, in a suit the parties to which were Sarai Jats of mauza Dholpur in the Batala tahsil of the Gurdaspur district, that they were governed by the chundavand and not by the pagvand rule of succession.*

... .. No. 5 P. R. 1909.

3. *Custom—Inheritance—Widow's right to succeed to her husband's collaterals—Brahmans of the Shakargarh tahsil, Gurdaspur district.—Found, that by custom among Brahmans of the Shakargarh tahsil in the Gurdaspur district a widow was entitled to succeed collaterally for her life to any property to which her husband, if alive, could have succeeded.*

... .. No. 7 P. R. 1909.

4. *Custom—Inheritance—Pagvand or chundavand—Gujars of mauza Hailakh, tahsil Shakargarh, Gurdaspur district.—Found, in a suit the parties to which were Gujars of mauza Hailakh in the Shakargarh tahsil of the Gurdaspur district, that they were governed by the pagvand and not by the chundavand rule of succession.*

... .. No. 14 P. R. 1909.

5. *Custom—Inheritance—Rights of daughter to succeed to her father in presence of collaterals—Muhammadan Parachos of Bhera city.—Found, that by custom among Muhammadan Parachos of the Bhera city, daughters are entitled to succeed to the urban immovable property of their father to the exclusion of his male collaterals.*

... .. No. 15 P. R. 1909.

6. *Custom—Inheritance—Succession of illegitimate son in presence of daughter lawfully born—Saidhu Jats of Nakodar tahsil, Jullundur district.—Found, that by custom among Saidhu Jats of the Nakodar tahsil, Jullundur district, an illegitimate son is not entitled to succeed to his mother's property in the presence of a daughter lawfully born of that mother.*

... .. No. 22 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—SUCCESSION—(contd.).

7. *Custom—Inheritance—Widow of son who has predeceased his father—Randhawa Jats of Amritsar district.—Found*, that by custom among Randhawa Jats of the Amritsar district the widow of a predeceased son succeeds to the property of her father-in-law against the brother of the last male owner.

... .. No. 30 P. R. 1909.

8. *Custom—Inheritance—Khatris of Satgharra, Montgomery district—Succession of collaterals in preference to a daughter's son—Hindu law—Burden of proof.—Held*, that the plaintiffs upon whom the onus lay had failed to establish that in matters of succession the Khatris of Satgharra were governed by custom and not by Hindu law, or that collaterals were entitled to succeed to the exclusion of a daughter's son.

... .. No. 34 P. R. 1909.

9. *Custom—Inheritance—Dogars of Amritsar district—Sister succeeds to acquired property in preference to collaterals of the sixth degree.—Found*, that by custom among Dogars of the Amritsar district a sister is entitled to inherit acquired landed property in preference to collaterals of the sixth degree.

... .. No. 35 P. R. 1909.

10. *Custom—Inheritance—Widow's right to succeed to her husband's collaterals—Udasi Sadhs of tahsil Muktsar, district Ferozepore.—Found*, that by custom among Udasi Sadhs of the Muktsar tahsil of the Ferozepore district a widow of a sonless proprietor was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.

... .. No. 40 P. R. 1909.

11. *Custom—Inheritance—Right of collaterals who had abandoned his ancestral holding and resided in a different village.—Held*, that the fact of a person having abandoned his ancestral holding and severing his connection with his village of origin and settling in another village for good, does not necessarily debar him or his sons from succeeding to his or their collateral's property in the ancestral village.

... .. No. 41 P. R. 1909.

12. *Custom—Inheritance—Sister succeeds in preference to collaterals—Panwars of mauza Bhotapur, tahsil Muzaffargarh.—Found*, that among Panwars of mauza Bhotapur, tahsil Muzaffargarh, a sister succeeds to the ancestral property of a deceased proprietor in preference to his collaterals in the fifth degree.

... .. No. 44 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—SUCCESSION—(contd.).

13. *Custom—Inheritance—Pagvand or chundavand—Sials of Jhang district.—Found*, in a suit the parties to which were Sials of the Jhang district, that they were governed by the *pagvand* and not by the *chundavand* rule of succession.

... .. No. 50 P. R. 1909.

14. *Custom—Inheritance—Right of widow to succeed to her husband's collaterals—Bhullar Jats of Amritsar and Gurdaspur districts.—Found*, that by custom among Bhullar Jats of the Amritsar and Gurdaspur districts a widow of a sonless proprietor was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.

... .. No. 51 P. R. 1909.

15. *Custom—Inheritance—Gift of landed property by way of dowry to a female—Mutation in favour of her husband—Death of donee without issue—Right of husband in presence of donor.—Held*, that a gift of landed property expressly made by way of dowry to a female on the occasion of her marriage enures solely for the benefit of the donee and her issue, and in case of her dying childless reverts to the donor.

The mere circumstances of her husband's name having been entered as donee in mutation proceedings does not after her death entitle him to retain possession of the property.

... .. No. 54 P. R. 1909.

16. *Custom—Inheritance—Sister's right to succeed in preference to collaterals in the seventh degree—Afghans of mauza Nasran, tahsil Hoshiarpur.—Found*, that the plaintiff, upon whom the *onus* rested, had failed to prove a custom whereby among Afghans of mauza Nasran, tahsil Hoshiarpur, a married sister was entitled to succeed to the ancestral property of her deceased brother in the presence of his male collaterals of the seventh degree.

... .. No. 55 P. R. 1909.

17. *Custom—Inheritance—Brahmans of Rawal in the Rawalpindi tahsil—Right of collaterals to succeed in preference to daughter—Hindu law.—Held*, that in matters of succession Brahmans of Rawal in the Rawalpindi district are governed by the general rules of agricultural custom and not by Hindu law, and consequently daughters are excluded by near agnates of the last male proprietor.

... .. No. 56 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—SUCCESSION—(contd.).

18. *Custom—Succession by adopted son to the collaterals of adoptive father—Kang Jats of the Daska tahsil, district Sialkot.—Held, that the defendant, the adopted son, on whom the onus lay, had failed to prove a custom by which an adopted son inherits to the collaterals of his adoptive father among Kang Jats of the Daska tahsil, district Sialkot.*

... .. No. 61, P. R. 1909.

19. *Held, that by a special custom among Agarwal banias of Ludhiana city, near collaterals exclude the daughter in succession to ancestral property.*

... .. No. 68 P. R. 1909.

20. *Custom—Succession—Daughter's right to succeed to property gifted to her grandfather in preference to male descendants of donor.—Held, that daughters are heirs under Hindu Law as well as under Customary Law, and that under Customary Law, the male descendants of a donor are not entitled to oust the female descendants of the donee in the direct line.*

... .. No. 84 P. R. 1909.

20. *Custom—Succession—Alienation of gifted land—Brahmans of mauza Charori Dakhli Majara, tahsil Nurpur, Kangra district—Hindu Law not applicable.—Held, that Brahmans of mauza Charori Dakhli Majara, tahsil Nurpur, Kangra district are governed by custom in matters of succession and alienation and not by Hindu Law, and that by custom land gifted by one of them reverts to the donor's family on the death of the donee or of his male issue, in default of lineal descendants.*

Held also, that by custom the donee or his descendant has no right to make a gift of such land to a stranger.

... .. No. 87 P. R. 1909.

22. *Custom—Succession of daughter to her mother's estate—Syads of mauza Masanian, tahsil Batala, district Gurdaspur.—Held, following Shah Nawaz v. Azmat Ali (No. 40 P. R. 1907), that Sayads of mauza Masanian, tahsil Batala, district Gurdaspur, are governed by the general rules of agricultural custom of the Punjab.*

Held also, that land which has come to a daughter from her father and has become her absolute property and has been gifted by her to her husband, reverts to her on his death and descends to her daughter as her heir, and not to the collaterals of her deceased husband.

... .. No. 96 P. R. 1909.

23. *Custom—Succession by adopted son collaterally in adoptive father's family—Jats of Rohtak district—Riwaj-i-am.—Held, that among Jats of the Rohtak district an adopted son or his heirs can by custom succeed collaterally to property to which the adoptive father would have succeeded, if alive.*

... .. No. 99 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

CUSTOM—SUCCESSION—(concl'd.).

24. *Custom—Succession—Collateral succession of adopted son—Sikh Jats of mauza Chuhar Chak, tahsil Moga, district Ferozepore.—Held*, that among Sikh Jats of mauza Chuhar Chak in the Moga tahsil of the Ferozepore district an adopted son, who is of the same got as the adoptive father, is entitled by custom to succeed collaterally in the family of his adoptive father.

... .. No. 103 P. R. 1909.

D.

DAMAGES.

Suit for—in respect of an act done by a public body—Period of limitation.

See *Indian Limitation Act, 1877* (5) No. 72 P. R. 1909.

DAUGHTERS.

1. *Succession by—among Brahmins of Rawal, Rawalpindi district.*

See *Custom—Succession* (17) No. 56 P. R. 1909.

2. *Succession by—among Agarwal banias, Ludhiana city.*

See *Custom—Succession* (19) No. 68 P. R. 1909.

3. *Are heirs under Hindu Law as well as under Customary Law.*

See *Custom—Succession* (20) No. 84 P. R. 1909.

4. *Succession of daughter to her mother's estate—Sayads of mauza Massanian, tahsil Batala, district Gurdaspur.*

See *Custom—Succession* (22) No. 96 P. R. 1909.

DAUGHTER'S SON.

Held, that though by strict Hindu Law a daughter's son cannot be adopted, this general rule may be varied by family custom, and often is so varied in the Punjab.

... .. No. 93 P. R. 1909, P. C.

DECLARATORY SUIT.

1. *Declaratory suit after the death of alienor in the lifetime of the widow.—Held*, that where a suit for possession is impossible owing to the presence of females entitled to hold for life, a suit on the part of the reversioners for a declaration to the effect that an alienation by a sonless proprietor shall not affect their reversionary rights is maintainable, notwithstanding that the alienor is dead at the time when the suit is brought.

... .. No. 64 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

DECLARATORY SUIT—(concl'd.).

2. *Declaratory suit by reversioners—Alienation found to be in part without necessity—Form of decree.—Held*, that in declaratory suits by reversioners to have an alienation declared void after the death of the alienor, if the Court finds, that the alienation is in part only for necessity, the decree should declare (1) that the alienation shall not take effect at all against the reversioners after the death of the alienor, and (2) that the reversioners shall not be entitled to possession until they have paid the sum found to be for "necessity."

... .. No. 92 P. R. 1909.

DECREE.

1. *Decree in contravention of the Punjab Land Alienation Act, 1900—*

Effect of—

See *Punjab Alienation of Land Act, 1900* (2) ... No. 60 P. R. 1909.

2. *Form of—in declaratory suits.*

See *Declaratory suits* (2) No. 92 P. R. 1909.

DEFENCE.

In pre-emption suits, vendee cannot improve his own position subsequent to sale and set this up in defence, so as to defeat the pre-emptor's suit.

... .. No. 90 P. R. 1909, F. B.

DISCRETION.

Discretionary powers of Court to allow amendment of plaint not usually interfered with on appeal.

See *Specific Relief Act, 1877* (2) No. 101 P. R. 1909.

DRAWEE.

Not named by the drawee himself--Liability of.

See *Negotiable Instruments Act, 1881* No. 71 P. R. 1909.

E.

EASEMENT.

Easement—Light and air—Obstruction—General principles.—Held, that the rule of decision in an action in respect to a right to light and air obstructed by a permanent erection is, whether in consequence of the obstruction the plaintiff has less light and air than before to such an appreciable degree as to injure his property in point of value, comfort, convenience or usefulness, according to its character as a residence or a place of business or warehouse, and that an injunction is the proper remedy where substantial and wrongful injury has been done to the plaintiff's rights.

... .. No. 8 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

ESTOPPEL.

1. Of drawee of bill of exchange by conduct.

See *Negotiable Instruments Act*, 1881 ... No. 71 P. R. 1909.

2. Plaintiffs claiming title from an adopted son are not estopped by reason of their father having signed a sale-deed as a witness made by the widow of the adopted son and the latter's mother, in which they claim title derived from the adoptive father and from the collaterals of the adoptive father and not from the adopted son.

... .. No. 93 P. R. 1909, P. C.

EXECUTION OF DECREE.

1. Release of property—Suit by decree-holder to establish right to attached property—Revival of previous application.

See *Indian Limitation Act*, Article 179, (12) No. 45 P. R. 1909.

2. Execution of decree—Surety under Chief Court Circular Order LVII, Rule II (i)—Liability of such surety—How and when enforceable.—Held, that where a man stands surety under Chief Court Circular Order LVII, Rule II (i), for a petitioner for revision to the Chief Court, the security must be limited to the security demandable under the rules of the Court, no matter in what terms the security bond is worded and must, therefore, necessarily be confined to the performance of the order under revision.

Held therefore, that no liability could be attached to the surety in this case unless and until the decree-holder had failed to satisfy his decree by the sale of the properties attached under the order under revision.

... .. No. 66 P. R. 1909.

F.

FEES.

See *Pleader and Client*. No. 1 P. R. 1909.

FOREIGN JUDGMENT.

Judgment passed in England against a defendant in India, who has been duly served with a writ of summons, but who did not enter appearance or deliver a defence, when the proceedings have been strictly in accordance with the existing rules, must be considered as one passed on the merits.

... .. No. 75 P. R. 1909.

FORM.

Of decree in declaratory suits.

See *Declaratory Suit* (2) No. 92 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

FURTHER RELIEF.

Plaintiff cannot bring a mere declaratory suit in respect of land, because it is not in possession of defendant but in possession of tenants under defendant.

See *Specific Relief Act* (2) No. 101 P. R. 1909.

G.

GIFT.

Gift to two or more persons without specifying their respective shares—Construction and nature—Tenants in common—Share of each passes to his representative.—'A,' a Hindu widow, by a registered deed gifted one of her houses to her four married daughters without specifying the shares, upon which the donees were to hold the house severally. After the death of one of the daughters the other three sold the entire house. Thereupon the husband of the deceased donee sued to recover one-fourth share of the sale price in respect of her one-fourth share of the house. The defence contended that the gift was one in joint tenancy with right of survivorship, and that therefore on the death of one of the four donees the share of the deceased lapsed to the survivors; and that in any case the share of the deceased being her *stridhan* would go to her mother, and failing the latter, to her sister.

Held, that a gift to two or more persons is not a gift in joint tenancy merely because the shares of the donees are not defined therein, and that in cases where the donees are incapable of forming a joint Hindu family they should, in the absence of a declaration in the deed of gift to the contrary, be presumed to hold as tenants in common without benefit of survivorship, in which case the share of those dying passes to their personal representatives.

... .. No. 39 P. R. 1909.

GUARDIAN AND WARD.

Alienation by de facto guardian—Contract void—Suit by ward for recovery of property so alienated—Limitation for such suit.

See *Indian Limitation Act*, 1877, Article 44 No. 23 P. R. 1909.

GUARDIAN AND WARDS ACT, 1890.

SECTION 7.

Guardian of property—Power of court to appoint guardian to the property of a minor who is a member of joint Hindu family.—*Held*, that it is not competent to a Court to appoint a guardian of the property of a minor who is a member of a joint Hindu family.

... .. No. 43 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

H.

HINDU LAW.

1. *Initial presumption among Khattris is that they follow Hindu Law.*

See *Custom—Alienation* (8) ... No. 58 P. R. 1909.

2. *Brahmans of Rawal, district Rawalpindi, governed in matters of succession by agricultural custom and not Hindu Law.*

See *Custom—Succession* (17) ... No. 56 P. R. 1909.

3. *Not applicable to Brahmans of mauza Charori Dakhli Majara, tahsil Nurpur, district Kangra.*

See *Custom—Succession* (21) ... No. 87 P. R. 1909.

4. *Sodhi Khattris of mauza Hardo Jhanda, tahsil Batla, district Gurdaspur, are presumably governed by Hindu Law.*

See *Custom—Alienation* (12) ... No. 79 P. R. 1909.

5. *Daughters are heirs by Hindu Law.*

See *Custom—Succession* (20) ... No. 84 P. R. 1909.

6. *Though by strict Hindu Law a daughter's son cannot be adopted, this general rule may be varied by family custom, and often is so varied in the Punjab.*

... .. No. 93 P. R. 1909, P. C.

7. *An adopted son cannot succeed to rozina dues, under the rules of Darbar Sahib, Amritsar—the matter is not one to be decided under Hindu Law, but under the custom and practice of the institution.*

See *Custom—Religious institutions* ... No. 94 P. R. 1909.

HINDU LAW—INHERITANCE.

1. See *Custom—Succession* (8) ... No. 34 P. R. 1909.

2. *Inheritance of stridhan—Marriage in approved form.—Held, that the stridhan of a Hindu wife dying childless, who has been married in one of the four approved forms of marriage, devolves upon her husband and not on her parents or their heirs.*

... .. No. 39 P. R. 1909.

HINDU LAW—JOINT FAMILY.

1. *Suit for recovery of a debt due to a joint Hindu family—Joinder of a co-parcener as defendant after the period of limitation.*

See *Indian Limitation Act, 1877, section 22.* ... No. 20 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

HINDU LAW—JOINT FAMILY—(concl'd.).

2. *Joint family property—liability of, for debts incurred by father for liquor.—Held, that the property of a joint family governed by the Daya Bhag is not liable in the hands of a son for debts incurred by his deceased father for liquor supplied to the latter who died before suit.*

... .. No. 24 P. R. 1909.

I.

IMMOVABLE PROPERTY.

For the purposes of section 268 of the Code of Civil Procedure a debt secured by a mortgage lien on land is not immovable but movable property.

... .. No. 18 P. R. 1909.

INDIAN BRITISH SUBJECT.

Who has made and broken contract in England, is amenable to the jurisdiction of the High Court of Judicature in England, after he has been properly served with a notice.

... .. No. 75 P. R. 1909.

INDIAN LIMITATION ACT, 1877.

1—SECTION 7.

Held, that the fact of the plaintiffs being minors at the date of alienation does not prevent defendant from holding adversely and can only extend the period to three years from the date when the youngest of them attains his majority.

See *Limitation* (3) No. 100 P. R. 1909.

2—SECTION 19.

And section 14—Acknowledgment—Acknowledgment in case of decree—New period—Exclusion of time of proceeding bonâ fide.—A obtained a decree in 1900 against B with a lien on a tea garden. In 1901 C in execution of a money-decree, which he had obtained in 1898 against B, attached that garden. B wrote two letters to A in March 1901 and October 1903, telling him about the attachment and asking him to inform the executing Court of his lien and to apply for recovery of the amount of his decree out of the sale-proceeds. A accordingly applied twice in 1901 and 1902 and recovered the amount due to him under his decree, but on appeal by B the execution sale was in 1905 set aside on the ground of irregularity, and A was made to refund the amount he had received out of the sale-proceeds. Immediately after, A applied for execution of his own decree, B pleaded that the application for execution not having been filed within three years from the date was barred by limitation.

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1877—(contd.).

Held, that the letters written by B to A in 1901 and 1903 amounted to an acknowledgment of A's right to execute and obtain satisfaction of the decree within the meaning of section 19 of the Indian Limitation Act, and saved A's application for execution from the bar of limitation.

Held also, that A was entitled under section 14 of the Act to exclude period, which elapsed between the date of his first application made in 1901 and the date on which he was ordered to refund the amount received by him out of the sale-proceeds of the tea garden.

Query.—Whether the applications of 1901 and 1902 were not "steps in aid of execution" within the purview of article 179 (4) of the Act.

... .. No. 52 P. R. 1909.

3. SECTION 22.

See *Pre-emption* (1) No. 6 P. R. 1909.

4. SECTION 22.

Joint Hindu family—suit for recovery of a debt due to—Joinder of a co-parcener as defendant after the period of limitation.—*Held*, that where in a suit for recovery of a debt due to a joint Hindu family an alleged co-parcener is on the objection of the defendant added as a co-defendant to the suit after the expiry of the period of limitation, no question of limitation arises and such joinder does not render the suit liable to dismissal by reason of section 22 of the Limitation Act as against the real defendant.

... .. No. 20 P. R. 1909.

5. SECTION 24.

ARTICLES 2 AND 36.

Limitation—Suit for compensation against Municipal Corporation—Indian Limitation Act, 1877, section 24, articles 2 and 36—starting point of limitation.—*Held*, that the provisions of article 2 of the Indian Limitation Act, 1877, is not merely applicable to those cases in which the defendant at the time of doing the act informs the other party in so many words that he is acting under such and such a provision of law; it is sufficient for him to show that in doing the act he was at the time under the honest belief that his act was authorised by Statute.

Held also, that the omission by a Municipal Corporation to give the other party the Statutory notice prescribed by section 120 C of the Municipal Act does not take the case out of the operation of article 2.

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1877—(contd.).

Held also, that if damage is caused to a person by an act alleged to be in pursuance of an enactment, article 2 of the Limitation Act is applicable, notwithstanding that damage resulted to plaintiffs' property not immediately but after the lapse of some time, though it does postpone the accrual of the cause of action under section 24 until such time as the damage occurred, and limitation will run against him only from the date of such accrual.

Held therefore, that when a plaintiff seeks compensation for damages in respect not of the original act done by a public body who purport to have acted in pursuance of Statutory powers, but of the consequences of such act which have resulted in injury to himself, he must, under article 2 of the Indian Limitation Act, 1877, sue within 90 days from the date when such injury occurred.

... .. No. 72 P. R. 1909.

6. ARTICLE 11.

Civil Procedure Code, 1882, sections 278, 283—Attachment—Application for removal of attachment—Omission of Judge to give decision with respect to a part of the property under attachment—Suit by claimant to establish right regarding the part so omitted—Limitation—Limitation Act, 1877, Schedule II, Article II.—Held, that when an executing Court under some misapprehension has omitted in its order to express an opinion or to give judgment on the merits with respect to some of the properties mentioned in the claim preferred by a judgment debtor under section 278 of the Code of Civil Procedure, the order cannot be treated regarding those properties as an order within the meaning of section 283, to which article 11 of the Second Schedule of the Indian Limitation Act would apply.

... .. No. 42 P. R. 1909.

7. ARTICLE 44

and articles 91, 144—Guardian and ward—Alienation by de facto guardian—Contract void—Suit by ward for recovery of property so alienated—Limitation for such suit.—Held, that an alienation by a Muhammadan uncle as a de facto guardian of his nephew's property is void *ab initio*, and consequently a suit for the recovery of the property against the alienee in such a case is governed by article 144 and not by articles 44 and 91, as he is not bound to set aside the alienation or to sue under either of those articles.

... .. No. 28 P. R. 1909.

8. ARTICLE 120.

Religious Institution—Suit for removal of a Mutwalli and Imam by reason of a change in his religious views—Limitation for such suit—Starting point of limitation—Limitation Act, 1877, Schedule II, Article 120.—Held, that the limitation applicable to a suit for a

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1877—(contd.).

declaration, that the Mutwalli and Imam of a certain mosque by reason of a change in his religious views at variance with the beliefs of the founders of the institution is liable to be dismissed from his office, is that contained in article 120 of the Second Schedule to the Indian Limitation Act, and the period begins to run from the date when such change takes place.

... .. No. 53 P. R. 1909.

9. ARTICLE 120.

Limitation—Declaratory suit, contesting alienation—Punjab Limitation Act, I of 1900, article 1—Indian Limitation Act, XV of 1877, article 120 and section 28.—Held, that the provisions of section 28, Indian Limitation Act of 1877, being expressly limited to suits for possession, do not apply to suits for declarations, and that a person in possession has no vested right to the benefit of any specific period of limitation, not in force when the suit was instituted.

Held therefore, that a suit instituted in January 1907 for a declaration that a sale-deed executed in January 1897 did not affect the reversionary rights of the plaintiffs was within limitation being governed by article 1 of the Schedule to the Punjab Limitation Act of 1900 and not by article 120, Schedule II, of the Indian Limitation Act of 1877.

... .. No. 69 P. R. 1909.

10. ARTICLE 132.

Benami transaction—Benami mortgage—Assignment by benamidar—Right of beneficiary against the property and the benamidar—Limitation.—Held, that a person who takes a mortgage of immovable property in the name of another, loses his lien on the security, if a *bond fide* transferee acquires it for value from the *benamidar*, but has a remedy against the latter for the money wrongfully received and retained by him, and it being charged on immovable property, the limitation for such a claim is that which is provided by article 132 of the Second Schedule to the Indian Limitation Act, 1877.

... .. No. 37 P. R. 1909.

11. ARTICLES 142 AND 144.

Absentee—Adverse possession in joint holding.

See *Adverse possession* (2) No. 86 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

INDIAN LIMITATION ACT, 1877—(concl'd.).

12. ARTICLE 179 (4).

Execution of decree—Release of property—Suit by decree-holder to establish right to attached property—Step in aid of execution—Revival of previous application.—Held, that where execution proceedings had been so obstructed that the decree-holder, through no fault of his own, was prevented from proceeding against the property attached, a subsequent application by him for execution against the same property after the removal of the obstruction must be treated as a continuance of his former application.

... .. No. 45 P. R. 1909.

INDIAN OATHS ACT, 1873.

The Indian Oaths Act, X of 1873, sections 8, 9 and 10—Local commissioner cannot administer oath.—Held, that it is not competent to a person who has been appointed a local commissioner for the purpose of recording evidence in a case to administer an oath to one of the parties in the circumstances referred to in sections 8, 9 and 10 of the Indian Oaths Act, 1873, he not being "a Court" within the meaning of these sections.

... .. No. 89 P. R. 1909.

INTEREST.

English Statute as to judgments carrying interest does not apply to India, nor does such a case fall within the scope of Act XXXII of 1839.

... .. No. 75 P. R. 1909.

J

JAINS.

By special custom among Jains of Delhi, adoption is a purely secular transaction, and a sonless widow may adopt without any authorisation of her husband.

See Custom—Adoption (3) No. 95 P. R. 1909.

JIRGA.

Resolution of—No restriction on jurisdiction of Civil Courts where the provisions of section 10 of the Punjab Frontier Crimes Regulation, 1887, are not acted upon.

See Jurisdiction of Civil Court No. 26 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

JURISDICTION.

1. *Suit against Ruling Chief with respect to property owned by him and situate in British India—Suit instituted without obtaining previous consent of Governor-General in Council—Maintainability of suit as against the co-defendants—Civil Procedure Code, 1882, section 433.—Held, that the Raja of Poonch is a Ruling Chief within the meaning of Section 433, Civil Procedure Code, and as such cannot be sued in Courts of British India in respect of immovable property acquired by him in that country without the previous consent of the Governor-General in Council.*

Held also, that a suit instituted by the reversionary heirs of a childless proprietor against a number of alienees holding separate and distinct portions of his estate under independent titles in which a Ruling Chief is but one of several defendants should not be dismissed against all the defendants, merely because it fails against the Ruling Chief on the ground that previous consent of Government, as required by Section 433, had not been obtained before the commencement of the suit, a defence peculiar to that defendant alone.

... .. No. 21 P. R. 1909.

2. *Jirga—resolution of—No restriction on jurisdiction of Civil Courts where the provisions of section 10 of the Punjab Frontier Crimes Regulation, 1887, are not acted upon—Punjab Frontier Crimes Regulation, 1887, sections 10, 12—Held, that the Civil Courts are not debarred from enforcing the provisions of the Pre-emption Act, 1905, merely because on a reference by the Deputy Commissioner a Jirga had passed a resolution amounting to an authoritative statement of a general custom to the effect that the members of one Biloch tuman in the Dera Ghazi Khan District, should not be allowed to acquire lands in the territory of another tuman, when such reference had not originated in a definite dispute of a character mentioned in section 10 of the Punjab Frontier Crimes Regulation, 1887, and when the Deputy Commissioner had taken no action under any of the clauses of sub-section 3 of that section.*

... .. No. 26 P. R. 1909.

3. *Suit on foreign judgment—Jurisdiction of High Court of Judicature in England over Indian British subjects residing in India under contract made and broken in England—Interest.—Held, that according to English Law it is the duty of the debtor to seek out his creditor and pay him wherever he may be, and therefore the fees of a solicitor residing in England for work done are payable in England, when no particular place of payment is named, and non-payment is a breach within the jurisdiction of the contract, which was to be performed in England.*

Held also, that a defendant who has made and broken a contract in England, and who is a British subject, is amenable to the jurisdiction of the High Court of Judicature in England, after he has been

The references are to the Nos. given to the cases in the "Record."

JURISDICTION—(contd.).

properly served with notice of action in accordance with the English rules of procedure, notwithstanding that he is a native of British India and residing there.

Held also, that a judgment passed in England against a defendant in India who has been duly served with a writ of summons but who did not enter appearance or deliver a defence, when the proceedings have been strictly in accordance with the existing rules, must be considered as one passed on the merits.

Held further, that the English Statute as to judgments carrying interest does not apply to India, nor does such a case fall within the scope of Act XXXII of 1839 and plaintiff suing on a foreign judgment cannot therefore recover more than appears on the face of the judgment.

... .. No. 75 P. R. 1909.

4. *Revision under section 70 (1) (a), Punjab Courts Act—Power of Chief Court to revise orders although they might be attacked on appeal from the decree—Civil Procedure Code (1882), section 588—Jurisdiction of Court in suits for damages for torts—Meaning of words "actually and voluntarily resides"—Civil Procedure Code (1882), sections 17 and 18.*—The plaintiffs brought a suit to recover compensation in the District Court of the Gujrat District on the allegation that the defendants had murdered a near relative of plaintiffs in the Faridkot State; where they were convicted and sentenced to imprisonment for life. The District Court held that the cause of action having arisen in the Faridkot State, the plaintiffs should institute their suit in that State. This order was upheld by the Divisional Judge on appeal. The Chief Court on revision under section 70 (1) (a) of the Punjab Courts Act—

Held, following *Pandit Ram Kant v. Pandit Rag Deo* (No. 60 P. R. 1897 F. B.) and *Asa Ram v. Tara Chand* (No. 44 P. R. 1899) that a revision lies to the Chief Court under section 70 (a) of the Punjab Courts Act from orders appealable under section 588 of the Civil Procedure Code (1882), in spite of the clause to that section to the effect that orders passed in appeals under the section shall be final.

Held also, that the defendants, although in confinement in jail in the Faridkot State, were still for the purposes of section 17 of the Civil Procedure Code (1882) "actually" and "voluntarily residing" in the Gujrat District where their homes and land are and where their families reside, and that therefore the Gujrat Court had jurisdiction to try the case.

... .. No. 77 P. R. 1909.

5. Civil Courts have no jurisdiction to convert a mortgage by way of conditional sale into a mortgage prescribed by section 6 (1) (a) of the Punjab Alienation of Land Act.

See *Punjab Alienation of Land Act* (1) ... No. 88 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

JURISDICTION—(conold.).

6. Power of Court to refuse to entertain pleas raised too late.

See *Civil Procedure Code*, 1882 (2) ... No. 93 P. R. 1909, P. C.

JURISDICTION—CIVIL OR REVENUE COURT.

Jurisdiction—Civil or Revenue Court—Plea raised by defendant in Civil Court in respect of which a suit could be brought in Revenue Courts—Suit against person in possession of occupancy rights under decree of Civil Court—Punjab Tenancy Act (XVI of 1887), section 77 (3) and (3) (h).—A, an occupancy tenant, mortgaged his occupancy rights in February 1905 to B, one of the landlords. Subsequently A sold his occupancy rights to another landlord C, and in June 1905 C sued B for possession by redemption. In this suit B pleaded that the sale to C was invalid under the provisions of the Tenancy Act, which plea, the Court held, it could not take cognisance of and decreed redemption on the 9th August, 1905. On the 4th August, 1905 B brought a suit in the Revenue Court to have the sale set aside, and this was decreed on the 13th January, 1906.

In June, 1906, C applied for execution of his decree, and was in due course put in possession of the land, B's objection being overruled.

B now sues C for possession on the ground that as the sale to him had been set aside by competent authority (*i.e.*, the Revenue Court) he was not entitled to oust B, the plaintiff. The Divisional Judge was of opinion that the suit fell under section 77 (3) (h) of the Punjab Tenancy Act, 1887, and was cognisable by a Revenue Court only.

Held, by a Division Bench (Robertson and Rattigan, JJ.) that as the sale had been definitely set aside by the Revenue Court, and defendant was therefore unable to rely upon it, no question could arise as to the validity or otherwise of the transfer in favour of defendant, and the only point in issue was, whether one of two landlords could recover possession of land, from which the other landlord had ousted him, and the suit was therefore cognisable by a Civil Court.

Held by the Full Bench (Robertson, J., dissenting), following *Asa Nand v. Kura* (No. 11 P. R. 1895, F. B.) and *Fakir v. Dhani Nath* (No. 24 P. R. 1907) that no plea raised by a defendant in reply to a civil claim can be entertained or taken cognisance of by a Civil Court (even incidentally), if that plea relates to any matter in respect of which such defendant would be entitled to bring a suit in a Revenue Court (*vide* section 77 (3) of the Punjab Tenancy Act, 1887), and that such pleas must be entirely ignored by a Civil Court, even if they go to the very root of the case.

... .. No. 76 P. R. 1909, F. B.

K.

KHATRIS.

1.—Presumably governed by Hindu law.

See *Custom—Alienation* (8) No. 58 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

2. *Sodhi Khattris of mauza Hardo Jhanda, tahsil Batala, district Gurdaspur, are not governed by custom.*

See *Custom—Alienation* (12) No. 79 P. R. 1909.

L.

LEGAL PRACTITIONERS ACT, 1879.

SECTIONS 28—30.

See *Pleader and Client.* No. 1 P. R. 1909.

LEGITIMACY.

Of children of a Minhas Rajput by a Mahajan woman.

See *Custom—Marriage.* No. 57 P. R. 1909.

LIMITATION.

1. In pre-emption suits under Punjab Pre-emption Act.

See *Punjab Pre-emption Act, 1905 (7), sections 28 and 29.* No. 74 P. R. 1909.

2. Starting point of—under article 2 of the Indian Limitation Act where damages occurred.

See *Indian Limitation Act (5), section 24* No. 72 P. R. 1909.

3. *Limitation—Conditional decree for possession on payment of a sum of money does not create a mortgage or new cause of action—Indian Limitation Act, XV of 1877, section 7 and articles 142 and 144—Minority.*—In 1899 plaintiffs sued for possession of the land in suit, which was sold by their mother during their minority in 1886 and obtained a decree setting aside the sale and decreeing possession of the land conditional on payment of Rs. 754—no period being fixed for such payment—plaintiffs did not execute their decree, but brought the present suit for possession in 1907, the youngest of them having attained his majority in 1901.

Held, that the conditional decree did not create a mortgage or "judicial hypothec" and that it did not in itself constitute a cause of action, and that the decree-holder must fall back on his original cause of action, and as this arose in 1887, the year of dispossession and commencement of adverse possession, the suit is barred either under article 142 or article 144 of the Indian Limitation Act.

Held also, that the fact of the plaintiffs being minors at the date of alienation could only extend the period to three years from the date when the youngest of them attained his majority under section 7 of the Act.

... .. No. 100 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

LOCAL COMMISSIONER.

Cannot administer oath referred to in sections 8, 9 and 10 of Indian Oaths Act, 1873.

See *Indian Oaths Act, 1873* No. 89 P. R. 1909.

LOCUS STANDI.

1. Of collaterals in eighth degree to contest gift by childless prioritor to a *pichhlag*.

See *Custom—Alienation* (10) No. 63 P. R. 1909.

2. *Status of alienee of reversi-mary right to contest an alienation.*

See *Custom—Alienation* (11) No. 67 P. R. 1909.

3. Reversioners of son-in-law, to whom land was gifted for benefit of daughter and her issue, have no *locus standi* to contest alienation of it.

See *Custom—Alienation* (13) No. 102 P. R. 1909.

M.

MARRIAGE.

1. *Marriage—Chadar andazi marriage between Minhas Rajput and a Mahajan woman.*

See *Custom—Marriage.* No. 57 P. R. 1909.

2. *Muhammadian Law—Marriage—Necessity of free consent by adult female—Acquiescence.—Held*, that among Muhammadans marriage is a civil contract, and that as is the case with other contracts freedom of consent in the contracting parties is one of the essential conditions of its validity.

Held also, that when a Muhammadan female attains the age of puberty she becomes *sui juris* in the eyes of her personal law, and a contract of marriage, to which she does not thereafter consent of her own free will, will not be binding upon her.

Held further, that mere silence on the part of the plaintiff for two years after the marriage, unaccompanied by any overt act such as would involve an unequivocal recognition by her of the subsistence of the matrimonial alliance, did not under the circumstances of the case amount to acquiescence, so as to debar her from obtaining relief in the shape of a declaration of invalidity of marriage.

... .. No. 73 P. R. 1909.

MATERIAL IRREGULARITY.

See *Revision* No. 45 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

MATRIMONIAL JURISDICTION.

Matrimonial jurisdiction—Appeal from order of single Judge of Chief Court sitting on original side—Divorce Act (IV of 1869), section 55—Punjab Courts Act (XVIII of 1884), section 9 (a)—Civil Procedure Code, section 2.—Held, that an order by a single Judge of the Chief Court sitting on the original side, refusing to strike off the record the name of a person impleaded as a co-respondent to a petition for dissolution of marriage and damages, is not appealable.

... .. No. 98 P. R. 1909.

MERGER—MORTGAGE.

Held, that when a mortgagee purchases the equity of redemption in respect of the land mortgaged the mortgagee rights merge in the rights of ownership.

... .. No. 59 P. R. 1909.

MINOR.

Competency of, to sue for breach of his betrothal made by his father.

See Right of Suit No. 3 P. R. 1909.

MINORITY.

Minority at the date of alienation can only extend the period of limitation to three years from the date when the youngest of the plaintiffs attains his majority.

See Limitation (3) No. 100 P. R. 1909.

MISJOINDER—

Of causes of action—where plaintiffs as reversioners sue for a declaration in one suit in regard to several alienations.

See Civil Procedure Code, 1882 (2) No. 93 P. R. 1909, P. R.

MORTGAGE—

1. By way of conditional sale—Reference to Collector futile after expiry of year of grace.

See Punjab Alienation of Land Act (1) No. 88 P. R. 1909.

2. Civil Courts have no jurisdiction to convert a mortgage by way of conditional sale into one prescribed by section 6 (1) (a) of the Punjab Alienation of Land Act.

See Punjab Alienation of Land Act (1) No. 88 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

MORTGAGE—(conold.).

3. Conditional decree for possession on payment of certain sum of money does not create a mortgage or judicial *hypothec*.

See *Limitation* (3) No. 100 P. R. 1909.

MORTGAGE DEBT—

Secured by a lien on land is not immovable but movable property for the purposes of section 268 of the Code of Civil Procedure.

... .. No. 18 P. R. 1909.

MUHAMMADAN LAW—MARRIAGE.

Marriage of widow during her iddat—Legality of such marriage.—Held, that a marriage contracted by a widow before the expiry of the period of her *iddat* is unlawful and void, and the mere fact that prior to the expiry of her *iddat* she has been delivered of the child, with which she was pregnant at the date of her late husband's death, cannot validate a marriage illegally solemnised before that period had elapsed.

... .. No. 29 P. R. 1909.

Validity of Marriage—Consent of adult female necessary.

See *Marriage* (2) No. 73 P. R. 1909.

N.

NATIVE CHRISTIANS.

See *Converts*.

... .. No. 36 P. R. 1909.

NEGOTIABLE INSTRUMENTS ACT, 1881.

SECTIONS 5, 7, 33 and 88.

Bill of exchange—Drawee—Negotiable Instruments Act (XXVI of 1881), sections 5, 7, 33 and 88—Estoppel by conduct—Contract Act (IX of 1872), section 231—Rights of undisclosed principal.—Where A drew four drafts on B, and B, without the knowledge or authority of A, substituted C as the drawee in his place, and C after that accepted the four drafts.—Held, that notwithstanding the provisions of section 88 of the Negotiable Instruments Act, 1881, A, the drawer, is not entitled to hold C, the so-called acceptor, liable on the bills—C not being the drawee cannot bind himself under section 33 of the Act by his acceptance.

The references are to the Nos. given to the cases in the "Record."

NEGOTIABLE INSTRUMENTS ACT, 1881—(concl'd.).

Held also, that the fact that C retired one of the four drafts and obtained possession of the four cases of merchandise covered by that draft, did not estop him from denying his liability on the other drafts, he having almost immediately repudiated his act and at once declined to retire the other drafts, and no third person having been adversely affected by his conduct.

Held also, that under section 231 of the Indian Contract Act, 1872, A, as an undisclosed principal, could take advantage of any contract made by B, his agent, with C subject to any rights which C might have as against B and that allegations of fraud and misrepresentation by B to C should be inquired into.

Held further, that assuming that there was a valid contract, A could sue for the whole amount which C agreed to pay and was not bound to sell the undelivered merchandise and sue only for the balance, if any, due to him upon the contract.

... .. No. 71 P. R. 1909.
O.

OCCUPANCY RIGHTS.

Occupancy rights—Alienation of occupancy rights—Right of reversioner to contest alienation even after it had been successfully contested by the landlord—Custom—Alienation—Gift of occupancy rights to daughter in presence of near male collaterals—Chimas of mauza Bhamu Kalan in the Lahore District—Burden of proof.—Held, that a reversioner is not debarred from suing to protect his reversionary interest against an alienation of occupancy rights, merely because such alienation has also been challenged by the landlord as an invalid alienation. The latter, even if successful, cannot on the death of the alienor step in and claim the holding, if there is a reversioner entitled to succeed under section 59 of the Act.

Held also, that in matters relating to alienation of ancestral landed property the Chimas of mauza Bhamu Kalan, who have for generations past followed agriculture and are solely dependent on land, are governed by the general rules of agricultural custom, and the onus of proving the validity of a gift of a share of an occupancy holding by a sonless male proprietor in favour of his daughter rests on the party asserting the existence of such a custom.

Found, that the defendant had failed to prove that the gift was valid by the custom of the parties.

... .. No. 38 P. R. 1909.

ONUS PROBANDI.

1. On adopted son among Kang Jats, Daska tahsil, Sialkot district, claiming to succeed collaterally.

See *Custom—Succession* (18) No. 61 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

ONUS PROBANDI—(concl'd.).

2. On donee, a *pichhlag*, that gift to him is valid by custom.

See *Custom—Alienation* (10) ... No. 63 P. R. 1909.

3. That *Sodhi Khatris* follow agricultural custom in regard to alienation is on the persons who allege it.

See *Custom—Alienation* (1) ... No. 79 P. R. 1909.

P.

PAGVAND OR CHUNDAVAND.

1. See *Custom—Succession* (2).

... .. No. 5 P. R. 1909.

2. See *Custom—Succession* (13)

... .. No. 50 P. R. 1909.

PARTIES.

1. Suit for recovery of a debt due to a Joint Hindu family—Joinder of a co-parcener as defendant after the period of limitation.

See *Indian Limitation Act, 1877, section 22* ... No. 20 P. R. 1909.

2. To suit for damages for breach of betrothal—contract made for benefit of minor.

See *Betrothal—Contract* ... No. 83 P. R. 1909.

PARTITION.

Partition of joint immovable property—Authority of Courts to give money decree in lieu of share—Partition Act, 1893.—Held, that in a suit for partition of joint immovable property the Court has no authority in the absence of an application under Act III of 1893, to grant a mere money decree in lieu of a definite share to the claimant.

... .. No. 36 P. R. 1909.

PICHHLAG.

Gift by sonless proprietor to *pichhlag*—*Locus standi* of distant collaterals to contest its validity.

See *Custom—Alienation* (10) ... No. 63 P. R. 1909.

PLAINT.

Amendment of.

See *Pre-emption* (3)... .. No. 10 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

PLEA—

Raised at the last stage of the case, not entertainable.

... .. No. 93 P. R. 1909, P. C.

PLEADER AND CLIENT.

Pleader and client—Suit by pleader to recover fee from client—Suit for amount actually allowed on taxation—Legal Practitioners Act, 1879, sections 28—30.—Held, that a pleader is not debarred by the provisions of the Legal Practitioners Act, 1879, from recovering a fee from his client which is actually allowed on taxation. Sections 28—30 of the Act are applicable only to those cases, in which agreements made between pleaders and their clients relate to the payment of remuneration in excess of, and apart from, the amount allowed in the taxation.

... .. No. 1 P. R. 1909.

PLEADINGS.

Plea raised by defendant in Civil Court, in respect of which a suit could be brought in Revenue Courts, cannot be taken cognisance of.

... .. No. 76 P. R. 1909, F. B.

PRE-EMPTION.

1. *Pre-emption—Sale to two persons—Shares of vendee and price specified—Divisible contract—Assignment by one of the vendees—Addition of assignee after period of limitation—Effect of such addition—Limitation Act, 1877, section 22.—On 18th October 1900 B and C purchased certain land in proportion of two-thirds and one-third, the price paid by them was fully specified in the deed of sale. The plaintiff brought an action against both of the vendees to enforce a right of pre-emption in respect of the whole sale within the period of limitation prescribed by law. It having been proved that C had assigned over the interest to a third party long before the institution of the suit, the Court, on the application of the plaintiff after the period of limitation had expired, ordered the assignee to be impleaded as a co-defendant. Thereupon the defence pleaded limitation. The Court allowed the plea in favour of the assignee, but decreed the suit for two-thirds of the claim against B. The latter appealed on the ground that part of the claim being dismissed as barred by limitation, the whole suit ought to have been dismissed as barred.—Held, that the price and shares being distinctly specified, the sale was divisible, and the plaintiff was consequently not debarred from claiming the two-thirds share sold to B by reason of dismissal of his suit in respect to the one-third share sold to C.*

... .. No. 6 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

PRE-EMPTION—(contd.).

2. *Custom—Pre-emption—Pre-emption on sale of house property—Katra Amar Singh, Amritsar City.—Held*, that the custom of pre-emption in respect of sales of house property by reason of vicinage in *Katra Amar Singh* of the city of Amritsar had not been established.

... .. No. 9 P. R. 1909.

3. *Pre-emption—Right of pre-emptor to purchase a part when entitled to whole—Amendment of plaint.—Held*, that a person who, under the provisions of the Pre-emption law, is entitled to pre-empt the entire bargain, i. e., part of the property sold under one clause, and the remainder under another clause, of the Pre-emption Act, forfeits his rights altogether if he sues for one portion, and in such a case where, in spite of defendant's objection to the contrary, he persists in his suit as laid, he is not entitled to amend his plaint.

... .. No. 10 P. R. 1909.

4. *Custom—Pre-emption—Pre-emption on sale of house property—Dinga, Gujrat district.—Found*, that the custom of pre-emption in respect of sale of house property by reason of vicinage exists in the town of Dinga in the Gujrat district.

... .. No. 19 P. R. 1909.

5. *Custom—Pre-emption—Pre-emption on sale of house property—Kot Nau in Khem Karn, tahsil Kasur, Lahore district.—Found*, that the custom of pre-emption in respect of sale of house property based on vicinage exists in Kot Nau, a sub-division of the town of Khem Karn, in the Kasur tahsil of the Lahore district.

... .. No. 32 P. R. 1909.

6. *Court's power to extend period fixed under section 19, Punjab Pre-emption Act.*

See Punjab Pre-emption Act (5) No. 78 P. R. 1909.

7. *No right of, arises on foreclosure of a right to redeem in respect of agricultural land.*

See Punjab Pre-emption Act (2) No. 82 P. R. 1909.

8. *The Punjab Pre-emption Act does not recognise a right of pre-mortgage.*

See Punjab Pre-emption Act (2) No. 82 P. R. 1909.

9. *Pre-emption—Sale of several houses adjoining one another—Suit by owner of a house adjoining one only of the houses sold—Defence by vendee—Meaning of word "adjacent," Punjab Pre-emption Act, 1905, section 13 (7), discussed.—Held by Full Bench—Chatterji, Rattigan and Chevis, JJ. (Chevis, J., dissenting), that when two houses*

The references are to the Nos. given to the cases in the "Record."

PRE-EMPTION—(contd.).

which adjoin one another are sold jointly, the right of pre-emption of the owner of a house, which adjoins only *one* of the two houses sold, extends to that *one* house only and not to both the houses sold.

The meaning of the word "adjacent" in Punjab Pre-emption Act, 1905, section 13 (7), discussed.—*Held* by Full Court (Robertson and Rattigan, JJ., dissenting), that where on such a sale the owner of the adjoining house sues for pre-emption in respect of the one of the two houses sold to which his right extends, the vendee is *not* entitled to say that by reason of his having under the sale-deed become owner of the other house he stands on an equal footing with plaintiff (both being owners of adjoining houses) and that the plaintiff cannot therefore pre-empt the house adjoining his own.

Bhagwan Das v. Mohan Lal (1) and *Ram Hit Singh v. Narain Rai* (2) dissented from.

Darehan Khan v. Sohaura Mal (3) overruled.

Uttam Chand v. Lahori Mal (4) approved of.

... .. No. 90 P. R. 1909, F. B.

10. *Pre-emption—vendee cannot defeat pre-emptor's claim by acquiring a status equal to plaintiff after the institution of the suit—Held* by the Full Bench (Rattigan, J., dissenting), that in a suit for pre-emption based on the ground that at the date of sale the pre-emptor was a proprietor in the village in which the property sold is situate, and the vendee was not, the vendee cannot defeat plaintiff's claim by becoming a proprietor in the village, whether by gift or otherwise, after the date of the institution of the suit, but before the passing of the pre-emption decree.

... .. No. 91 P. R. 1909, F. B.

PRINCIPAL AND AGENT.

Right of undisclosed principal to take advantage of contracts made by his agent.

See *Negotiable Instruments Act* No. 71 P. R. 1909.

PUNJAB ALIENATION OF LAND ACT.

1. *Punjab Alienation of Land Act (XIII of 1900), sections 6 and 9—Mortgage by way of conditional sale—Reference to Collector futile after expiry of year of grace under Regulation XVII of 1806—Civil Courts have no jurisdiction to convert a mortgage by way of conditional sale into a mortgage prescribed by section 6 (1) (a) of the Act.—M. S. mortgaged the land in suit to G. for Rs. 500 on the 8th April 1896, redeemable within six years, otherwise the land to be considered as*

(1) I. L. R. XXV All. 421.

(2) 124 P. R. 1907.

(3) I. L. R. XXVI, All. 389.

(4) 112 P. R. 1907.

The references are to the Nos. given to the cases in the "Record."

PUNJAB ALIENATION OF LAND ACT—(concl'd.).

sold. On 31st August 1903 the mortgagee applied to the Collector and prayed that in lieu of the said mortgage by way of conditional sale a mortgage of the kind recognised by section 6 (1) (a) of the Punjab Alienation of Land Act, 1900 might be granted to him for a period of 20 years. The Collector thereupon summoned the mortgagor and on his objecting to the change, the Collector recorded the fact of mortgagor's refusal and left matters in *statu quo*. In June 1904 the mortgagee applied to the District Judge for issue of notice of foreclosure, who after referring to the proceedings before the Collector decided that a further reference to the Collector under section 9 (3) of the Punjab Alienation of Land Act was unnecessary and issued notice of foreclosure, which was duly served upon the mortgagor on 23rd June 1904. The mortgagor took no objection to this notice nor did he attempt to redeem the land. On 28th July 1906 the mortgagee instituted the present suit for possession as vendee, the year of grace having expired. The First Court found that plaintiff had duly complied with all the provisions of Regulation XVII of 1806, but held that plaintiff was not entitled to take possession as full owner, because no reference was made to the Collector under section 9 (3) of the Punjab Alienation of Land Act and passed a decree for possession of the land as mortgagee for 20 years under section 6 (1) (a) of that Act, this decree was upheld by the Divisional Judge. On further appeal, the Chief Court—

Held, that the year of grace prescribed by Regulation XVII of 1806 having expired and plaintiff having complied with all the provisions of the Regulation he was now suing for possession as full proprietor, there was no mortgage now in existence or "current" within the meaning of section 9 (2) of the Punjab Alienation of Land Act, so that even the Collector had now no power to interfere with the right of the *quondam* mortgagee.

Held also, that Civil Courts have no power at all to convert a mortgage by way of conditional sale into a mortgage prescribed by section 6 (1) (a) of the Punjab Alienation of Land Act, this being a matter left entirely to the Revenue authorities.

Held further, that the District Judge to whom application was made for issue of a notice of foreclosure under Regulation XVII of 1806 was right in not referring the mortgage again to the Collector under section 9 (3) of the Punjab Alienation of Land Act, it having already been before him and he having declined to take action in respect of it; that action on the part of the Collector being equivalent to his giving his sanction to the retention of the conditional sale clause.

... .. No. 88 P. R. 1909.

2. *Decree in contravention of the Punjab Alienation of Land Act (1900)—effect of.*—*Held*, that a decree passed in violation of the terms of section 3, clause (2), of the Punjab Alienation of Land Act, XIII of 1901, is not a nullity. Section 9 of Punjab Act I of 1907, amending the Punjab Land Alienation Act, 1900, provides for such a case.

... .. No. 60 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

PUNJAB COURTS ACT, 1884.

1. SECTION 40 (b).

See *Valuation of Suit*. ... No. 23 P. R. 1909.

2. SECTION 70 (1) (a).

See *Revision* (1) ... No. 45 P. R. 1909.

3. *Section 70 (1) (a)—Power of Chief Court to revise orders appealable under section 588 of the Civil Procedure Code.*

See *Jurisdiction* (4) ... No. 77 P. R. 1909.

PUNJAB FRONTIER CRIMES REGULATION, 1887.

SECTION 10.

And Section 12—Resolution of a Jirga is no restriction on the jurisdiction of a Civil Court where the provisions of section 10 are not acted upon.

See *Jurisdiction of Civil Court* ... No. 26 P. R. 1909.

PUNJAB LIMITATION ACT, 1900.

1. *Alienation by male proprietor of ancestral land—Suit by reversioner to recover possession of such land—Limitation—Punjab Limitation Act, 1900—Onus probandi as to the inapplicability of the Act.—Held, that the onus of proving the inapplicability of Punjab Limitation Act, 1900, to a suit by a reversioner of a male proprietor, to recover possession of ancestral land alienated by such proprietor, on the ground that the sale was made without any legal necessity or consideration, lies upon the plaintiff, who should satisfy the Court that the cause of action had accrued to him before that Act came into operation.*

... No. 11 P. R. 1909.

2. *Custom—Alienation—Declaratory suit after the death of alienor in the lifetime of the widow—Punjab Limitation Act, 1900, Article 1.—Held, that when a suit for possession is impossible owing to the presence of females entitled to hold for life, a suit on the part of reversioners for a declaration to the effect that an alienation by a sonless proprietor shall not affect their reversionary rights, is maintainable notwithstanding that the alienor is dead at the time when the suit is brought.*

Also, that Article 1 of the Punjab Limitation Act is applicable to such a suit.

... No. 64 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

PUNJAB LIMITATION ACT—(concl'd.).

3. *Held*, that a suit instituted in January 1907 for a declaration that a sale-deed executed in January 1897 did not affect the reversionary rights of the plaintiffs was within limitation, being governed by Article 1 of the Schedule to the Punjab Limitation Act of 1900, and not by Article 120, Schedule II of the Indian Limitation Act of 1877.

... .. No. 69 P. R. 1909.

PUNJAB PRE-EMPTION ACT, 1905.

1. SECTION 3 (5).

Pre-emption—Sale of immovable property by a receiver under section 356, Civil Procedure Code is not subject to pre-emption.—Held, that a sale of immovable property by a receiver, under direction of the Court, under section 356 of the Code of Civil Procedure, is a sale in execution of an order of a Civil Court within the terms of section 3 (5) of the Punjab Pre-emption Act, 1905 and consequently not subject to pre-emption.

... .. No. 46 P. R. 1909.

2. *Pre-emption—Agricultural land—Punjab Pre-emption Act, II of 1905, section 4—No right of pre-emption arises on mortgages or on foreclosure of a right to redeem a mortgage.—One L. mortgaged his agricultural land by way of conditional sale to B. D.—B. D. had notice issued on L. under Regulation XVII of 1806, the year of grace expired on 5th June 1901. In 1905 B. D. brought a suit to obtain possession of the land. The claim was contested by L., but a compromise was arrived at, and it was agreed that the land should remain in the possession of the mortgagee (B. D.) and that if L. (the mortgagor) failed to redeem the mortgage within two years on payment of the mortgage debt together with costs, the mortgagee should on the expiration of that period be deemed to be the absolute owner of the land. The Court passed a decree in conformity with the said compromise on 3rd March 1905. The mortgagor failed to redeem the land within the said period. His brother, the present plaintiff, now brings a suit for pre-emption.*

Held, (1) that if the said decree conferred upon the mortgagee no more extensive rights than that of a mortgagee, the plaintiff's suit must fail, as the Punjab Pre-emption Act of 1905 does not recognise the right of pre-mortgage, and (2) if the mortgagee by virtue of the decree become entitled after the expiry of two years to absolute ownership, the plaintiff's suit must also fail, as in that event he must be taken to be suing for pre-emption in respect of a transaction which amounts to a foreclosure of the mortgagee's right to redeem the land, and under section 4 of the Punjab Pre-emption Act of 1905 no right of pre-emption arises on the foreclosure of a right to redeem in respect of agricultural land.

... .. No. 82 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

PUNJAB PRE-EMPTION ACT—(contd.).

3. *Punjab Pre-emption Act (No. II of 1905), section 11, Part II, word "tribe"*—*Pre-emption claimed by an Arora of a different tribal sub-division to vendor.*—*Held*, that the word "tribe" in section 11, part II, of the Punjab Pre-emption Act, 1905 covers the whole group of Aroras in the village who satisfy the conditions laid down in that section.

... .. No. 62 P. R. 1909.

4. SECTION 13 (7).

Meaning of word "*adjacent*" discussed.

... .. No. 90 P. R. 1909 F. B.

5. *Pre-emption—Punjab Pre-emption Act, II of 1905—Court's power to extend the time fixed under section 19.*—*Held*, that under section 19 of the Punjab Pre-emption Act, 1905 the Court has power to extend the period originally fixed by it, even after expiry of that period. Provided (1) that the Court should not extend the period save for good and sufficient reason; and (2) that in any event the extension of the period cannot in certain cases suffice to bring a claim within limitation when it would, save for such extension, have been barred by limitation.

... .. No. 78 P. R. 1909.

6. SECTION 22.

Pre-emption—Purchase-money—Good faith.—*Held*, that the price entered in a deed of sale is fixed in good faith within the terms of section 22 of the Pre-emption Act, if it is actually paid for the property sold, but in the case of a transfer in satisfaction of old debts it is for the Court to find out whether the actual value of the debts amounted to its face value or not, and in case of its arriving to the latter conclusion it should ascertain the market value of the property.

... .. No. 47 P. R. 1909.

6. SECTIONS 28 AND 29.

Pre-emption—Limitation—Rights accrued before and after commencement of Punjab Pre-emption Act, II of 1905, sections 28 and 29.—*Held*, that every claim to the right of pre-emption made after the commencement of the Punjab Pre-emption Act, II of 1905 (*i.e.* the 11th May 1905) is governed by the provisions of that Act whether that right has accrued *before* or *after* its commencement.

Held also, that the Act purports to fix one year as the period of limitation for every claim to pre-emption, and that any one whose cause of action arose and against whom limitation has begun to run

The references are to the Nos. given to the cases in the "Record."

PUNJAB LIMITATION ACT—(concl'd.).

under article 120 of the Indian Limitation Act, 1877, but which has not expired before the commencement of the Act, will have one year within which to sue from the date of the commencement of the Act under section 28, and any one, whose cause of action arises or whose right to sue accrues *after* the commencement of the Act or against whom limitation began to run for the first time *after* the commencement of the Act, will have one year within which to sue, such year to be computed from the periods laid down in that section.

Held therefore, that a suit for pre-emption brought on the 8th February 1907, in respect of a sale, dated the 2nd September 1904, is barred by limitation under section 28 of the Act, notwithstanding that mutation was not effected till the 23rd February 1906.

... .. No. 74 P. R. 1909.

PUNJAB TENANCY ACT, 1887.

1. SECTION 100 (2).

Validation of proceedings where these had been mistaken as to jurisdiction—Registration of decree of Civil Court in Revenue Court.—Where a suit cognizable by a Revenue Court only had been instituted in and decided by a Civil Court, the presiding officer of which was invested with revenue powers which did not give him jurisdiction to try the suit, *held* that, as a matter of principle, the decree should not be registered as the decree of a Revenue Court.

... .. No. 25 P. R. 1909.

2. *Punjab Tenancy Act, XVI of 1887, sections 59, 111 and 112—Statement of custom in a Wajib-ul-arz cannot override section 59—Agreements limited to term of Settlement.*

Held, that it is settled law that statements of custom in a *wajib-ul-arz* cannot override section 59 of the Punjab Tenancy Act 1887.

Held also, that an "agreement" under sections 111 and 112 of the Act expressly limited to the term of the first Settlement, cannot be held to persist through a later Settlement in which the agreement was not renewed.

... .. No. 97 P. R. 1909.

R.

RELIGIOUS INSTITUTION.

1. *Suit for removal of a Mutwalli and Imam by reason of a change in his religious views—Limitation for such suit.*

See *Indian Limitation Act, 1877* (8), article 120.

... .. No. 53 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

RELIGIOUS INSTITUTION—(conold.).

2. *Darbar Sahib, Amritsar—Adopted son—Succession to rozina dues.*

See Custom—Religious institutions ... No. 94 P. R. 1909.

RES JUDICATA.

Jurisdiction of Civil or Revenue Court—Landlord and tenant—Ejectment of tenant in execution of a Revenue Court decree—Suit by tenant in Civil Court for recovery of possession of land other than that leased to him—Res judicata—Competency of Civil Court to try subsequent suit.—Held, that a suit for recovery of possession by a tenant who had been ejected in execution of a decree of a Revenue Court, on the allegations that the decree in question included, in addition to the land leased to him, other plots over which he had either rights of occupancy or had become proprietor by long adverse possession, is cognizable by a Civil Court only, and the decree of the Revenue Court cannot operate as a res judicata, that Court having no jurisdiction to try the present suit.

... .. No. 12 P. R. 1909.

REVERSIONER.

Right of, to contest alienation of occupancy rights even after it had been successfully contested by the landlord.

See Occupancy Rights.

... .. No. 38 P. R. 1909.

REVERSIONARY RIGHT.

Held, that a reversioner's right to contest an alienation under Customary law is not transferable to a stranger.

... .. No. 67 P. R. 1909.

REVIEW.

Dismissal of suit for default—Failure of plaintiff to avail himself of the provision of section 99—Review of judgment—Civil Procedure Code, 1889, sections 98, 99, 623.—Held, that no review of judgment is admissible under section 623 of the Code of Civil Procedure of an order dismissing a suit for default under section 98, where the plaintiff has failed to avail himself of his proper remedies under section 98 of the Code.

... .. No. 33 P. R. 1909.

REVISION.

Material irregularity—Punjab Courts Act, 1884, section 70 (1) (a).—Held, that misapplication of a ruling is material irregularity within the meaning of section 70 (1) (a) of the Punjab Courts Act, 1884.

... .. No. 45 P. R. 1909.

The references are to the Nos. given to the "cases" in the "Record."

REVISION—(conold.).

2. To Chief Court—security taken under Chief Court Circular Order LVII, rule II (1)—Execution of decrees.

See Execution of decrees (2).

... .. No. 66 P. R. 1909.

3. Surety under Chief Court Circular Order LVII, rule II (1), for petitioner for revision to the Chief Court—Extent of liability of.

See Execution of decree (2) No. 66 P. R. 1909.

4. Power of Chief Court to revise orders appealable under section 588, Civil Procedure Code.

See Jurisdiction (4) No. 77 P. R. 1909.

RIGHT OF SUIT.

Minor—Competency of, to sue for breach of his betrothal made by his father—Contract—Damages.—Held, that a minor is competent to maintain a suit for damages for breach of his betrothal which had been made by his father during his minority.

... .. No. 3 P. R. 1909.

S.

SALE.

Custom—Alienation—Sale by limited owner—Failure to prove payment of the whole of the consideration—Maintainability of such sale.—Held, that a sale of immovable property by a limited owner ought not to be maintained, where a considerable fraction of the whole consideration is found to have been previously inserted to keep off pre-emptors and formed no part of the price actually paid.

The Courts should in such a case lean to the side of strictness and refuse to allow a party in a suit to take advantage of his own fraud.

... .. No. 27 P. R. 1909.

SPECIFIC RELIEF ACT, 1877.

1. Specific Relief Act, I of 1877, section 42, proviso—Declaratory suit brought under direction of Revenue Court under section 98 (1) of the Punjab Tenancy Act, XVI of 1887.—The plaintiffs were the brothers of one Buta Khan deceased, who by his will, left his landed property to his brothers and sons in certain proportions. Upon Buta Khan's death mutation was effected of the property entirely in favour of the sons and widows. The plaintiffs were in possession of only a small area of 12 kanals 19 marlas in one village, and were in respect of

The references are to the Nos. given to the cases in the "Record."

SPECIFIC RELIEF ACT, 1877—(concl'd.).

this recorded as tenants-at-will holding under the sons. The sons got notice of ejectment issued in regard to this land. The brothers then sued in the Revenue Court to contest the notice of ejectment, and the Revenue Court passed an order under section 98 (1) of the Punjab Tenancy Act, 1887, requiring the brothers to bring a civil suit for the purpose of determining the validity of the will. The brothers then brought the present suit for a declaration that the will is valid, and that the defendants have no right to oust them from the 12 *kanals* 19 *marlas* of land in their possession. The Lower Courts held, that the suit was barred under the proviso of section 42 of the Specific Relief Act, 1877, plaintiffs not having included in their suit a claim for possession to their shares according to the will in the portions of the estate of which they were at present out of possession.

Held, that the cause of action was the notice of ejectment, and the relief sought was a declaration that the will was valid and that the plaintiffs were not liable to ejectment, and so far as the ejectment proceedings were concerned, the suit included all the relief to which the plaintiffs (who were in possession of 12 *kanals* 19 *marlas*) were entitled in respect of the proceedings of the Revenue Courts, the mere fact that the will on which plaintiffs based their title to that area purported also to convey title to other property being immaterial.

Held therefore, that the suit was not barred under the proviso of section 42 of the Specific Relief Act, 1877.

... .. No. 81 P. R. 1909.

2. *Specific Relief Act, I of 1877, section 42, proviso—Land in possession of tenants—Further relief—Discretionary powers of court to allow amendment of plaint.—Held*, that the fact that the land in dispute is in possession of tenants, who hold under defendants in no way entitles the plaintiff, who is out of possession, to bring a declaratory suit. In such a case plaintiff is able to seek further relief than a mere declaration of title within the purview of section 42 of the Specific Relief Act, 1877.

Held also, where the Courts below have refused to exercise in favour of the plaintiff their discretion to allow an amendment of the plaint after a very full consideration of the circumstances of the case, and the consequences of such refusal are in no way serious, the Chief Court should not interfere with that discretion, where it was not exercised arbitrarily or without the Courts knowing all the facts of the case and applying their minds to them.

... .. No. 101 P. R. 1909.

SUITS VALUATION ACT, 1887.

Jurisdiction—Rules under section 9 of the Suits Valuation Act, 1887—Value of suit for purposes of jurisdiction, how far affected by new rules.—Held, that the rules framed under section 9 of the Suits Valuation Act, 1887, for the valuation of suits for custody of a wife, have not retrospective effect, and cannot therefore affect jurisdiction with respect to an appeal in a suit instituted before they came into force.

... .. No. 31 P. R. 1909.

The references are to the Nos. given to the cases in the "Record."

SURETY.

Under Chief Court Circular Order LVII, rule 2 (1), for petitioner for revision to the Chief Court—Extent of liability of—

See Execution of decree (2) No. 66 P. R. 1909.

T.

TENANCY IN COMMON.

See Gift No. 39 P. R. 1909.

V.

VALUATION OF SUIT.

Suit for redemption—Value for purposes of further appeal—Punjab Courts Act, 1884, section 40 (b).—Held, that for purposes of section 40 (b) of the Punjab Courts Act, 1884, the value of a suit for redemption is the sum found by the first Court to be payable on redemption, and the fact that the Lower Appellate Court on appeal had reduced that sum does not alter the value of the property involved in the decree.

Further held, that the amount found due to the mortgagee for repairs is included in the jurisdictional value of the appeal.

... .. No. 23 P. R. 1909.

VENDEE.

Cannot defeat pre-emptor's claim by acquiring a *status* equal to plaintiff after the institution of the suit.

See Pre-emption (10) No. 91 P. R. 1909, F. B.

W.

WAJIB-UL-AZZ.

1. *Entry in—Subsequent to abandonment—No trust.*

See Absentee No. 85 P. R. 1909.

2. *Entries in—cannot override section 59, Punjab Tenancy Act.*

See Punjab Tenancy Act, 1887 (2) No. 97 P. R. 1909.

WIDOW.

1. The widow cannot by deed provide for the descent of property (which she has inherited from her husband) after her death in a line different from that prescribed by law either with or without the consent of reversioners.

... .. No. 93 P. R. 1909, P. C.

2. A sonless widow may adopt a son without any authorisation of her husband among Jains of Delhi.

See Custom—Adoption (3) No. 95 P. R. 1909.

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XX of 1891—See Punjab Municipal Act, 1891.

V of 1898—See Criminal Procedure Code, 1898.

XV of 1903—See Extradition Act, 1903.

APPEAL.

1. *Judgment of single Judge exercising original criminal jurisdiction—Appeal—Revision—Criminal Procedure Code, 1898, sections 369, 434, 439.—Held that the Chief Court has no power to revise either on appeal or revision the judgment of a single Judge exercising original criminal jurisdiction.*

... .. No. 1 P. R. 1909 Cr.

2. *In criminal cases distinction between appeal from a conviction and appeal from an acquittal pointed out.*

See Criminal Procedure Code (7) ... No. 15 P. R. 1909 Cr.

C

CANTONMENT CODE, 1899.

Cantonment Code, 1899—Chief Court's power to revise orders inflicting a fine under section 283—Section not applicable to breaches of conditions of a licence—convict is entitled to copy of proceedings.—Held, that an

The references are to the Nos. given to the cases in the "Record."

CANTONMENT CODE, 1899—(concl'd.).

order inflicting a fine under section 283 of the Cantonment Code, 1899, for breach of the conditions of a license is a judicial order, and the Chief Court has therefore full power to revise it.

Held also, that section 283 is inapplicable to such a case.

Held further, that a convicted person is entitled to a copy of the proceedings in the Summary Register.

See *Jurisdiction* (4) ... No. 9 P. R. 1909 Cr.

COMMITTING MAGISTRATE.

Jurisdiction of—to weigh the evidence of direct witnesses in cases triable by Sessions Court.

... ... No. 10 P. R. 1909 Cr.

CONFESSION.

Confession—*Confession made to a Magistrate of a Native State and written down by his reader—Admissibility of—Criminal Procedure Code, 1898, sections 164, 364, 533—Evidence Act, 1872, section 26.—Held*, that in the absence of any inference of prejudice, a confession made to a Magistrate of a Native State which was duly recorded in every other respect does not become inadmissible against the maker, merely because it was written down by the reader of the Magistrate.

Although the terms of sections 164 and 364, Criminal Procedure Code, are to be strictly observed, such a defect can be cured by examining the Magistrate as provided for in section 533.

... ... No. 2 P. R. 1909 Cr.

COPY OF PROCEEDINGS.

A convicted person is entitled to a copy of the proceedings in the Summary Register.

... ... No. 9 P. R. 1909 Cr.

CRIMINAL PROCEDURE CODE, 1898.

1. *Sections 106 (3) and 107—Power of Appellate Court to take security to keep the peace—Procedure of Magistrate under section 107.—Held*, that a Magistrate seized of a case under section 107 (3) and (4) of the Criminal Procedure Code cannot pass the summary order for security to keep the peace allowable by section 349 (2), but must go through the procedure prescribed in sections 112 to 117.

Held also, that a Magistrate, as an Appellate Court, cannot act under section 106 (3) of the Code in *all* appeals before him, but only when the Courts below had itself the power to take security.

... ... No. 7 P. R. 1909 Cr.

The references are to the Nos. given to the cases in the "Record."

CRIMINAL PROCEDURE CODE, 1898—(contd.).

2. *Criminal Procedure Code, 1898, sections 147 and 439—Notice of proceedings under section 147 necessary—Grave irregularity if not given—Revision by Chief Court.—Held*, that notice of procedure under section 147, Criminal Procedure Code, must be given to accused to give him an opportunity of showing that the right claimed has not been exercised within three months next before the institution of the enquiry—*Also* that it is a grave irregularity in the exercise of jurisdiction, if no such notice is given.

Held further, that the Chief Court has power under section 439, Criminal Procedure Code, to interfere on the revision side with such orders.

... .. No. 12 P. R. 1909 Cr.

SECTION 164.

3. *and sections 364, 533—Admissibility of a confession made to a Magistrate of a Native State and written down by his reader.*

See *Confession*. No. 2 P. R. 1909 Cr.

4. *Sections 253 and 437—Accused discharged—Order for re-trial by District Magistrate—Power of revision by Chief Court.—The accused was tried for an offence under section 406, Indian Penal Code. The Magistrate who tried the case, after hearing the whole of the evidence for the prosecution and after fully discussing the whole case, discharged the accused, disbelieving the prosecution story; thereupon the complainant made an application for revision to the District Magistrate, who by order, dated 5th December 1907, set aside the order of discharge and sent the case to the Court of another Magistrate for a re-trial. From this order an application for revision was made to the Chief Court, which was rejected on the 8th January 1908 by order of a single bench. The accused was then tried again and convicted. The conviction was confirmed by the Sessions Judge. On an application for revision, the Chief Court—*

Held, that a Criminal Court cannot review its own order. The order of the Chief Court, dated 8th January, being clearly within jurisdiction, it cannot be interfered with on review, either by the same or any other bench of the Court.

Held also, following *Jai Ram v. Mukhan* ⁽¹⁾ and *Dulla v. The Emperor* ⁽²⁾ that in a case, where after taking the whole of the evidence for the prosecution and discussing the whole case fully, a Magistrate discharges the accused, an order by a District Magistrate for re-trial on the same evidence by another Magistrate, though not absolutely illegal, should not be made except in the rarest of cases.

Held further, that where such an order for re-trial has been found to be not justified and seriously prejudicial to the accused, the Chief Court will go into the evidence of the case as if it were an appeal, to see whether the guilt of the accused has been brought home to him or not.

... .. No. 8 P. R. 1909 Cr.

⁽¹⁾ 8 P. R. 1900 Cr.

⁽²⁾ 2 P. R. 1901 Cr.

The references are to the Nos. given to the cases in the "Record."

CRIMINAL PROCEDURE CODE, 1898—(concl'd.).

SECTION 369.

5. *and section 434—Judgment of single Judge exercising original criminal jurisdiction—Appeal.*

See *Appeal* (1) No. 1 P. R. 1909 Cr.

6. *Section 417.—Held, that the object of section 417 of the Code of Criminal Procedure is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a retrial and not to obtain opinions of a High Court on abstract points which do not arise on the facts established.*

See *Indian Penal Code.* No. 14 P. R. 1909 Cr.

7. *Criminal Procedure Code, V of 1898, section 417—Distinction between appeals from acquittals and appeals from convictions.—Held, that although there is nothing in section 417, Criminal Procedure Code, which indicates that an appeal from an acquittal should receive any different treatment from any other appeal or class of appeals, there is in fact this marked distinction, namely, that when an accused has been acquitted by a Magistrate after hearing all the evidence against him, the presumption is that there was at least reasonable doubt, and the Appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant, whereas in an appeal from a conviction the benefit of all reasonable doubt has to be given in favour of the appellant.*

... .. No. 15 P. R. 1909 Cr.

SECTION 439.

8. *Revision—Judgment of single Judge with jury exercising original criminal jurisdiction.*

See *Revision* (1). No. 4 P. R. 1909 Cr.

SECTION 476.

9. *Criminal Procedure Code, section 476—Magistrate who can take action.—Held, that it is only the individual Magistrate before whom the offence was committed in Court, who can take action under section 476, Criminal Procedure Code.*

... .. No. 6 P. R. 1909 Cr.

D

DISCRETION.

Subordinate Courts have a very considerable discretion in the matter of publishing lists of touts.

... .. No. 11 P. R. 1909 Cr.

The references are to the Nos. given to the cases in the "Record."

E

EVIDENCE.

Committing Magistrate is entitled to weigh the evidence of direct witnesses, in cases triable by Sessions Court.

... .. No. 10 P. R. 1909 Cr.

EVIDENCE ACT, 1872.

SECTION 26.

See *Confession*.

... .. No. 2 P. R. 1909 Cr.

EXTRADITION ACT, 1903.

SECTION 7.

Surrender of persons charged with offences in Native States—Powers of Magistrate executing warrants issued by a Political Agent.—Held, that a District Magistrate who is addressed with a view to execution of a warrant issued by a Political Agent of a Native State under the authority of section 7 (1) of the Indian Extradition Act, XV of 1903, must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not.

... .. No. 3 P. R. 1909 Cr.

I

INDIAN FOREST ACT, 1878.

The Indian Forest Act, VII of 1878, section 85, clause (b)—Permitting cattle to trespass—Absence of owner at the time of trespass.—Held, that the question whether an owner of cattle is guilty or not of an offence of permitting cattle to trespass under section 25, clause (b) of the Indian Forest Act, 1878, does not depend upon the absence or presence of the owner of the cattle at the moment, but upon the question of fact in each case, namely, did he or did he not in fact permit his cattle to trespass, and the answer will depend upon the whole circumstances of the case.

... .. No. 16 P. R. 1909 Cr.

INDIAN PENAL CODE.

Indian Penal Code, section 430—Condition precedent to a conviction—Criminal Procedure Code, section 417—Object of the section.—Held, that a condition precedent to a conviction under section 430 of the Penal Code is that the accused has committed mischief, as defined in section 425, and it must be proved that the accused caused the destruction of some property or some such change in any property or in the situation thereof as destroyed or diminished its value or utility, or affected it injuriously.

The references are to the Nos. given to the cases in the "Record."

INDIAN PENAL CODE—(concl'd.).

Held also, that the object of section 417 of the Code of Criminal Procedure is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a retrial, and not to obtain opinions of a High Court on abstract points which do not arise on the facts established.

... .. No. 14 P. R. 1909 Cr.

J

JURISDICTION.

1. Of Magistrate under section 476, Criminal Procedure Code.

... .. No. 6 P. R. 1909 Cr.

2. Chief Court's power to revise orders inflicting a fine under section 283 of the Cantonment Code.

See *Cantonment Code*, 1899 No. 9 P. R. 1909 Cr.

3. Competency of Chief Court to revise orders under section 12 of the Legal Practitioners Act, 1879, declaring a person a tout.

See *Legal Practitioners Act*, 1879 No. 11 P. R. 1909 Cr.

4. *Jurisdiction of committing Magistrates to weigh the evidence of direct witnesses in cases triable by Sessions Courts.*—*Held*, that a committing Magistrate is entitled at any rate to some extent to weigh the evidence of direct witnesses and to pronounce as to their credibility.

... .. No. 10 P. R. 1909 Cr.

K

KASUR MUNICIPALITY.

Held, that the provisions of sub-section 4 of section 92 of the Punjab Municipal Act cannot be read into the bye-law as framed by the Kasur Municipal Committee.

See *Punjab Municipal Act*, 1891 No. 13 P. R. 1909 Cr.

L

LEGAL PRACTITIONERS ACT, 1879.

Legal Practitioners Act, XVIII of 1879, section 36—*Competency of Chief Court to revise orders under section 13 declaring a person a tout.*—*Held*, that proceedings under the Legal Practitioners Act, XVIII of 1879, are neither civil nor criminal, and consequently an order under section 36 of the Act cannot be revised by the Chief Court except under its power of superintendence under section 13 of the Punjab Courts Act.

The references are to the Nos. given to the cases in the "Record."

LEGAL PRACTITIONERS ACT, 1879—(concl'd.).

Held also, that Subordinate Courts have a very considerable discretion in the matter of publishing lists of touts, and the Chief Court will not interfere with any such order, unless it can be shown that the provisions of section 36 have not been duly complied with or that there are other good and substantial reasons.

... .. No. 11 P. R. 1909 Cr.

M

MAGISTRATE.

1. Action of—under section 476, Criminal Procedure Code.

See *Criminal Procedure Code* (9) No. 6 P. R. 1909 Cr.

2. Power of committing Magistrate to weigh the evidence of direct witnesses.

See *Jurisdiction* (4) No. 10 P. R. 1909 Cr.

N

NEWSPAPER.

Newspaper—Not printing name of a printer and publisher—Offences under sections 3 and 12, Act XXV of 1867.—Held, that the object of the rule contained in section 3, Act XXV of 1867, is that a paper printed should clearly intimate who is liable as printer and who is liable as publisher, and that the words "*ba ihtimam Ram Saran Datt printer, Hindustan Steam Press, Lahore men, Lala Bhawani Dass Manager ke liye chapa*" do not contain such intimation as to the publisher.

Held also, that sections 3 and 12 do not deal with intention. If the rule contained in section 3 has not been complied with, an offence has been committed and is punishable under section 12.

Held further, that printers and publishers cannot be allowed to select for themselves the description to be used in professing to comply with the Act, they must use the descriptions prescribed by the Act.

... .. No. 5 P. R. 1909 Cr.

P

PRINTER.

Name of, must be shown on newspaper.

See *Newspaper* No. 5 P. R. 1909 Cr.

The references are to the Nos. given to the cases in the "Record."

PUBLISHER.

Name of, must be shown on newspaper.

See *Newspaper* No. 5 P. R. 1909 Cr.

PUNJAB COURTS ACT, 1884.

Power of superintendence of Chief Court under section 13.

See *Legal Practitioners Act*, 1879 ... No. 11 P. R. 1909 Cr.

PUNJAB MUNICIPAL ACT, 1891.

Punjab Municipal Act, XX of 1891, section 92, sub-section (4) and section 145—Infringement of bye-law framed by the Kasur Municipality.—Held, that non-compliance with the provisions of the first part of sub-section (4) of section 92 of the Municipal Act, XX of 1891, does not of itself make a person criminally liable to the penalty provided for the infringement of a bye-law framed by a Municipal Committee under the said section; it only enables the Committee to issue a notice to him, calling upon him to alter or demolish the building.

Held also, that the bye-law framed by the Kasur Municipality under section 92 of the Punjab Municipal Act, a breach of which is punishable with a fine, does not make it obligatory on the person giving to the Committee a notice of his intention to erect or re-erect a building, to refrain from so erecting or re-erecting within six weeks from the date of that notice, and the provisions of sub-section (4) of section 92 of the Municipal Act cannot be read into the bye-law as framed by the Committee.

... .. No. 13 P. R. 1909 Cr.

R

RETRIAL.

Power of District Magistrate to order—when to be exercised.

See *Criminal Procedure Code*, 1898 (4) ... No. 8 P. R. 1909 Cr.

REVISION.

1. *Judgment of single Judge with jury exercising original criminal jurisdiction—Criminal Procedure Code, 1898, section 539.—Held*, that no application for revision under section 439 of the Criminal Procedure Code, 1898, lies in a case where the applicant has been convicted and sentenced at a trial held by a single Judge of the Chief Court with the aid of a jury in the exercise of the Court's original criminal jurisdiction.

... .. No. 4 P. R. 1909 Cr.

The references are to the Nos. given to the cases in the "Record."

REVISION—(concl'd.).

2. An order under section 36 of the Legal Practitioners Act, 1879, cannot be revised by the Chief Court except under its power of superintendence under section 13 of the Punjab Courts Act.

See *Legal Practitioners Act*, 1879 ... No. 11 P. R. 1909 Cr.

3. Chief Court's power of—in regard to orders inflicting a fine under section 283 of the Cantonment Code.

See *Cantonment Code*, 1899 (3) ... No. 9 P. R. 1909 Cr.

4. Accused discharged—Order for retrial by District Magistrate—Power of revision by Chief Court in regard to the order after retrial.

See *Criminal Procedure Code*, 1898 (3) ... No. 8 P. R. 1909 Cr.

5. Chief Court has power to interfere on the revision side in cases under section 147, Criminal Procedure Code.

See *Criminal Procedure Code*, 1898 (2) ... No. 12 P. R. 1909 Cr.

S

SECURITY TO KEEP THE PEACE.

Power of Appellate Court to take security to keep the peace.

See *Criminal Procedure Code*, 1898 (1) ... No. 7 P. R. 1909 Cr.

T

TOUTS.

Subordinate Courts have a very considerable discretion in the matter of publishing lists of tout.

See *Legal Practitioners Act*, 1879 ... No. 11 P. R. 1909 Cr.

Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Mr. Justice Lal Chand.

SARJU PARSHAD AND OTHERS,—(DEFENDANTS),—
PETITIONERS,

Versus

GIRDHARI LAL,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE

Civil Revision No. 411 of 1905.

Pleader and client—Suit by pleader to recover fee from client—Suit for amount actually allowed on taxation—Legal Practitioners Act, 1879, Sections 28—30.

Held that a pleader is not debarred by the provisions of the Legal Practitioners Act, 1879, from recovering a fee from his client which is actually allowed on taxation. Sections 28—30 of the Act are applicable only to those cases in which agreements made between pleaders and their clients relate to the payment of remuneration in excess of, and apart from, the amount allowed in the taxation.

Petition for revision of the order of Mr. Kirthi Singh, Judge, Small Cause Court, Delhi, dated 12th October 1904.

Shadi Lal, for petitioners.

Ram Bhaj Datta, for respondent.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—The view taken by the Lower Court is directly supported by *Hazari Lal v. Tilock Chand* ⁽¹⁾, the finding being that there was no agreement. The counsel for the petitioner, however, relied upon *Sarat Chundar Roy Chowdhry v. Chundra Kanta Roy* ⁽²⁾ for contending that the claim could not be decreed at all as being opposed to the provisions of Section 28, Legal Practitioners Act. This contention is evidently based on a mis-

3rd Decr. 1906.

(1) 136 P. R., 1893.

(2) I. L. R., XXV Cal., 805.

apprehension of the section and of the judgment quoted. Section 28 only deals with cases, where there is an agreement and provides that the agreement shall not be valid unless it is made in writing and filed in Court. It does not at all profess to deal with cases where there is no agreement as found in the present case. The authority quoted by *Sarat Chundar Roy Chowdhry v. Chundra Kanta Roy* ⁽¹⁾ does not at all support the contention. It was a case where fee was claimed for the conduct of a criminal action on the ground of an oral agreement and for work and labour done such claim was held to be not entertainable as opposed to the provisions of the Legal Practitioners Act. But the view taken in *Razi-ud-din v. Karim Bakhsh* ⁽²⁾, as stated at page 174, was expressly accepted as containing a correct exposition of the scope and intention of the provisions of the Legal Practitioners Act which bear on this point. This is further apparent from the circumstance that in cases where the fees given were only such as could be legally obtained under Section 27, the rules were ordered to be discharged (*vide* last paragraph of the judgment in *Sarat Chundar Roy Chowdhry's* case). It was held by the High Court at Allahabad (*Razi-ud-din v. Karim Bakhsh* ⁽²⁾), agreeing with the view taken by the Madras High Court (*Rama v. Kunji* ⁽³⁾), that what these Sections (28—30) did contemplate was to make provision for agreements made between pleaders and their clients which relate to the payment of remuneration in excess of, and apart from, the amount allowed in the taxation, and that they were wholly inapplicable to a case in which a man had agreed to take only, and nothing more than, the amount allowed on taxation. The latter proposition is not consistent with the view taken in *Hazari Lal v. Tilok Chand* ⁽⁴⁾. But in either case the fee decreed in the present instance is not in excess of what the plaintiff would receive under Section 27.

The decree is, therefore, not opposed to Section 28, or the judgment in *Sarat Chundar Roy Chowdhry's* case. On the other hand, it is directly supported by *Hazari Lal v. Tilok Chand* ⁽⁴⁾, and indirectly by *Razi-ud-din v. Karim Bakhsh* ⁽²⁾ and *Rama v. Kunji* ⁽³⁾. I, therefore, uphold the decree and reject the petition for revision with costs.

Application dismissed.

⁽¹⁾ I. L. R., XXV Cal., 805.

⁽²⁾ I. L. R., XII All., 169.

⁽³⁾ I. L. R., IX Mad., 375.

⁽⁴⁾ 136 P. R., 1893.

No. 2.

Before Mr. Justice Robertson and Mr. Justice Lal Chand.

NIDHU AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

RAM SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 733 of 1901.

Custom—Inheritance—Right of daughter to inherit self-acquired land in presence of near male collaterals—Hindu Rajputs of Kangra District.

Found that defendant had failed to prove that by custom among Hindu Rajputs of the Kangra District near male collaterals were entitled to succeed to the self-acquired property of a sonless proprietor held by him in a different village in preference to his daughter.

*Further appeal from the decree of J. G. M. Rennie, Esquire,
Divisional Judge, Hoshiarpur Division, dated 5th August 1901.*

Sohan Lal, for appellants.

The judgment of the Court was delivered by

LAL CHAND, J.—This is a case of succession to self-acquired property among Hindu Rajputs of Kangra District and *tashil*. The defendants-appellants are near collaterals of Jangi, the last male owner, and plaintiffs are his daughters. The property in suit was acquired by the grandfather of Jangi, and is situate in a village other than the ancestral, the defendants being related through the great-grandfather of Jangi. 3rd Nov. 1906.

The Lower Appellate Court has decreed the claim following *Lakha v. Hari* (1) which seems to be exactly applicable. It is contended in appeal that according to the District *Riwaj-i-am*, the defendants-appellants have a preferential right, and that daughters if married as plaintiffs, are entirely excluded from succession. But the provisions of the *Riwaj-i-am* obviously apply to ancestral property. It is not entered that the same rule is applicable irrespective of the question whether the property is self-acquired or ancestral, and in the absence of any such entry the provisions cannot be construed contrary to the generally accepted principle so as to exclude daughters from succession to self-acquired property. As laid down correctly in paragraph 23 (2), page 25, and remark 2, page 30 of the "Digest of Customary Law" by Sir William Rattigan, "the exclusion of the daughter in favour of collaterals is generally confined to landed property derived from a common ancestor."

In this case there is further the additional circumstance that the property in suit is not even situate in the ancestral village. There is, therefore, no room for doubt that the *onus* lay on defendants to prove that they were entitled to exclude daughters from succession to such property. Beyond alluding to the *Riwaj-i-am* which has already been noted, the pleader for appellant was unable to refer to any proof on the record to establish any such custom. He pressed for a remand for further inquiry, but the defendants have had sufficient opportunity to prove their case in the Lower Courts, and as pointed out by the learned Divisional Judge unless some reasons were adduced to render it likely that a further enquiry would lead to a result in defendants' favour, such enquiry should not be ordered. The Divisional Judge gave the defendants an opportunity to produce any case when, under the circumstances found in the present suit, collaterals had been able to eject daughters, but they could show none. In the one case produced *Tabhu v. Gulabo* decided by the Divisional Judge of Hos iarpur on 6th October 1892, it was found that in the absence of any known agnates, the daughters were entitled to succeed, the defendants having failed to prove any definite relationship. This case is not relevant to show that by local custom the daughters are excluded from succeeding to self-acquired property by collaterals of her father who do not own land in the village. There is, therefore, no proof of special or local custom as alleged, and in the absence of any such proof the plaintiffs, who are daughters of Jangi, are his direct heirs under Hindu Law and certainly entitled to succeed. The parties are agriculturist Rajputs, and as such ostensibly governed by customary law in matters of succession, but as pointed out in the recent Full Bench judgment in *Daya Ram v. Sohail Singh* (1), it is permissible to fall back as a last resort on personal law for the decision of the point in issue where no definite rule of customary law applicable to the case can be found. The daughters of Jangi are, therefore, entitled to succeed under Hindu Law, even if they have failed to prove by positive evidence a rule of customary law favouring their succession under the circumstances of the case. The appeal must, therefore, fail and is dismissed with costs.

Appeal dismissed.

(1) 110 P. R., 1906, F. B.

No. 3.

Before Mr. Justice Lal Chand.

MUHAMMAD OMAR,—(PLAINTIFF),—APPELLANT,

Versus

BUDHA,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1182 of 1906.

*Minor—Competency of, to sue for breach of his betrothal made by his father—Contract—Damages.**Held* that a minor is competent to maintain a suit for damages for breach of his betrothal which had been made by his father during his minority.*Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 25th April 1906.*

Fazal Ilahi, for appellant.

Gurcharan Singh, for respondent.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—This is a suit for damages for breach of betrothal contract. The Lower Appellate Court has dismissed the suit on the ground that plaintiff was not a party to the contract of betrothal, and, therefore, cannot sue for damages on breach. The contract was made during plaintiff's minority by his father, and according to the plaint it was broken one month before suit when plaintiff had attained his majority. There does not appear to be any sound reason why plaintiff cannot sue for damages. There is hardly any substantial difference in this respect between the law as it prevails in England and in India.

13th Dec. 1906.

The women are not regarded as chattels in England as remarked by the Divisional Judge, nor I believe in India, and if they formally contract themselves there in the betrothal and, marriage, the contract is entered into here, on their behalf, by their father as their legal guardian. They are not the subject-matter of contract on the score of being property. According to personal law, which governs the parties, whether Hindus or Muhammadans, a father is the legal guardian of his children for contracting them into marriage. When a contract of marriage is, therefore, entered into by a father for the benefit of his children, he makes the contract as their legal guardian, and the real parties to the contract are the children and not their fathers. The articles presented

at the time, no doubt, belong to the father, but the gift is made by the father for the benefit of his minor child as his legal guardian, and the minor child is, therefore, entitled to ask the Court to take the articles into the account in assessing the damages for breach. The learned Divisional Judge is not right in holding that no one can sue for breach of a contract except one of the parties thereto. It was held in *Daropti v. Juspai Rai* (1), a case somewhat similar to the present, that under the law of contract in India as enunciated by the Indian Contract Act, a person for whose benefit a promise has been made by another person upon a joint consideration, moving both from the plaintiff and a third party, is competent to maintain an action against the promisee, specially when the plaintiff appears from the terms of the agreement to be the person for whose benefit the contract was made. In that case the person for whose benefit the contract was made, was adult at the time. In the present case the plaintiff was a minor when the contract was made. But this circumstance only further strengthens the plaintiff's right to sue as in this case, the contract was entered into by plaintiff's legal guardian and, truly speaking, he is the real party to the contract. I, therefore, hold in this case as in the connected case No. 1765 of 1906 that the plaintiff is competent to sue for damages for breach of contract of his betrothal. I accept the appeal, set aside the decree of the Lower Appellate Court, and remand the case for a decision on the merits. Stamp-fee will be refunded and other costs will be costs in the case.

Appeal allowed.

No. 4.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

KAIM AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

ALA DIN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

APPELLATE SIDE. }

Civil Appeal No. 428 of 1905.

Custom—Alienation—Will—Competency of a childless proprietor to make a will in favour of distant collaterals in presence of near agnates—Chiman Jats of Rawalpindi District.

Found that by custom among the Chiman Jats of Rawalpindi District, a bequest of ancestral property by a sonless proprietor in favour of distant collaterals is invalid in the presence of his near agnates.

Further appeal from the decree of D. C. Johnstone, Esquire, Divisional Judge, Rawalpindi Division, dated 24th January 1905.

Kamal-ud-din, for appellants.

Fazal-i-Ilahi, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—The sole point for decision in this appeal is *22nd Feby. 1907.* the validity of a will made by a Chiman Jat of the Rawalpindi District, the plaintiffs-objectors are related to the testator Sarfaraz in the third degree, and the defendants-devisees are his collaterals in the fourth generation. The will purports to have been executed in lieu of services rendered by the defendants to the testator, but the reference to services as consideration for the bequest is apparently a pure fiction entered in the deed to disguise the arbitrary nature of the alienation. Sarfaraz died shortly after making his will in February 1896. The present suit was not instituted until nearly seven years after in January 1903, but the delay in institution is explained by the circumstances that the plaintiffs were minors at the time when the will was executed in February 1896. There is reason to believe that the defendants took advantage of plaintiffs' minority to change the course of succession in their own favour by the will, specially as it appears that Sarfaraz devised in defendants' favour not only his own estate but also his reversionary rights in an estate held by a granddaughter of his uncle Madat. Be this however as it may, we have very little difficulty in agreeing with the learned Divisional Judge, on the merits that the defendants have failed to prove the validity of the will by custom. There is practically no proof on the record to support its validity, and there is no provision in the district *Rivaj-i-am* either specifically applicable to Chiman Jats. Questions 37 and 38 of the *Rivaj-i-am* refer to dispositions of property by will. It is noted under question 37 by the Settlement Officer conducting the enquiry as "a well established fact that "a man has power to make a testamentary disposition of some "part of his property." But when dealing with the question (No. 38), whether a disposition of property can be made only with the consent of their heirs or contrary to their wishes, he remarks: "This is a very doubtful point, and I should hesitate "to say that any clearly defined custom had been made out in "case of any tribe. The Gakhars' reply is that a man can make "a testamentary disposition of property without the consent of "his heirs; but I am quite certain that if a case were to arise, "the heirs would not agree to this view if a large share of the

“property were so treated. At present each person asked the “questions thinks only of increasing his own powers upon his “estate and answers accordingly.” The answer given by other tribes, such as Khattars, Pathans, Rajputs, Awans, Jats, Gujars, Hindus and Bhabras is noted to be the same as that of Gakhars; but the examples given on pages 53—55 include not a single instance of either Jats or of Rajputs. Under the circumstances and specially in view of the opinion recorded by the Settlement Officer who conducted the enquiry, the general answer noted for Jats is of no value to support the validity of the will in dispute in the present case.

It was moreover contended in argument on the strength of certain general remarks in *Hassan v. Jahana* ⁽¹⁾ that the *onus* lay on the plaintiffs to prove that the will was invalid. These observations were, however, intended to explain that in applying to any particular case the *onus* as laid down in *Gujar v. Sham Das* ⁽²⁾, considerations based on creed, tribe and locality of the parties concerned, ought not to be entirely left out of account. They were not intended to suggest any the least departure from the view enunciated by the Full Bench judgment, and any possible misapprehension on this point was particularly safeguarded against by the following remark on page 219 of the report :—
 “My object in saying this is not to throw the least discredit “on the Full Bench ruling, but simply to make it clear how “the question of *onus* should be treated in cases where the “ruling is not directly applicable to the tribe before the Court.”
 The parties in *Gujar v. Sham Das* were Jats as in the present case, and, therefore, the ruling would here be directly applicable. They are not proprietors in one of the central districts of the Province. But this is immaterial. For, as explained in Full Bench judgment in *Ramji Lal v. Tej Ram* ⁽³⁾, “when the facts “are the same as in *Gujar v. Sham Das*, that is, when the land “which the owner for the time being seeks to alienate is found “to have come down to him from his ancestors as his share “of the land held by them as members of a village community, “the principles laid down in that case apply equally as regards “initial presumption whether the land is situated in a central “or in any other district of the Punjab.” There is nothing here either in the constitution of the village or of the tribe which would render inapplicable “the principle which was “adopted, not, any *a priori* grounds but merely as a material

(1) 71 P. R., 1904.

(2) 107 P. R., 1887, F. B.

(3) 73 P. R., 1895, F. B.

“deduction from the facts.” We, therefore, hold that the *onus* lay on the defendants-legatees to prove that the will executed in their favour by Sarfaraz excluding plaintiffs from succession, who are his natural heirs, is valid by custom. As shown already this *onus* they have failed altogether to discharge. We therefore, agree with the Lower Appellate Court in decreeing plaintiffs’ suit for a declaration, and dismiss the appeal with costs.

Appeal dismissed.

No. 5.

Before Mr. Justice Lal Chand.

LABH SINGH AND ANOTHER,—(PLAINTIFFS),—

APPELLANTS,

Versus

NARAIN SINGH,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 136 of 1905.

Custom—Inheritance—Pagvand or chundavand—Sarai Jats of Dholpur, tahsil Batala, Gurdaspur District.

Found in a suit the parties to which were Sarai Jats of mauza Dholpur in the Batala tahsil of the Gurdaspur District, that they were governed by the *chundavand* and not by the *pagvand* rule of succession.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 14th May 1904.

Gurcharan Singh, for appellants.

Shelverton, for respondent.

The judgment of the learned Judge was as follows :—

LAL CHAND, J.—The parties in this case are Sarai Jats of mauza Dholpur, tahsil Batala in the Gurdaspur District, and the sole question for decision is whether in matters of succession the parties follow *pagvand* or *chundavand* rule. I agree with the Lower Courts that the custom proved to be applicable to the parties is division by *chundavand* rule. It is an admitted fact that Dewa Singh, father of the parties, received his share of ancestral estate in accordance with the *chundavand* rule, and although this is alleged to have occurred before 1852, it is an important and relevant instance in point. Out of the four instances deposed to by Sadar Kanungo in the adjoining villages owned by Jats of this tribe, 12th June 1906.

instance No. 1 is doubtful, but Nos. 2, 3 and 4, and particularly the last, clearly prove that property was inherited in accordance with the *chundavand* rule. The same custom is entered as applicable to Sarai Jats in the *Riwaj-i-am* of 1865—68. It is true, as contended, that no such custom is entered in the customary law prepared for the district in 1893, and the rule therein given for the tribes of *tahsil* Batala is stated to be *pagvand*. But no special mention is there made of Sarai Jats, and the *pagvand* rule referred to is given as the ordinary rule of inheritance and not as a rule of universal application. The entry in the customary law of 1893 cannot, therefore, be held to have any special application to the present case, nor can it be relied upon to turn the scale in plaintiffs' favour. Moreover, admittedly on death of Dewa Singh, father of the parties, mutations were effected in accordance with the *chundavand* rule without any objection, and plaintiffs have instituted the present claim three years after alleging a trick on Patwari's part which they have not even attempted to substantiate. The counsel for appellant relied on the following cases to support his contention :—*Chattar Singh v. Hem Singh* ⁽¹⁾, *Kundan v. Sundar Singh* ⁽²⁾, *Paras v. Imam Din* ⁽³⁾, and *Gopal v. Shewag Ram* ⁽⁴⁾. None of these cases are, however, applicable, both tribe and localities being different. Special stress was, however, laid in argument on the last quoted case, viz., *Gopal v. Shewag Ram*. But the parties in this case were Jats of Rohtak District and the decision apparently was based on the particular facts of the case rather than on the general ground of *onus probandi* in such matter. On the other hand, the precedent more apposite to the circumstances of the present case appears to be the case reported as *Hakim Singh v. Sochet Singh* ⁽⁵⁾, a case of Randhawa Jats of Amritsar District where the facts were somewhat similar to the present case and *chundavand* rule was held to apply. I, therefore, hold in concurrence with the Lower Courts that the preponderance of proof in the present case is in favour of the *chundavand* rule which the parties apparently seem to have accepted at mutation on death of Dewa Singh, their father, and I accordingly dismiss the appeal with costs.

Appeal dismissed.

⁽¹⁾ 62 P. R., 1885.

⁽²⁾ 17^d P. R., 1889.

⁽³⁾ 74 P. R., 1898.

⁽⁴⁾ 12 P. R., 1899.

⁽⁵⁾ 134 P. R., 1892

No. 6.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

BRIJ LAL,—(DEFENDANT),—APPELLANT,

Versus

MASSAN,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 521 of 1906.

Pre-emption—Sale to two persons—Shares of vendee and price specified—Divisible contract—Assignment by one of the vendees—Addition of assignee after period of limitation—Effect of such addition—Limitation Act, 1877, Section 22.

On 15th October 1900, B and C purchased certain land in proportion of two-third and one-third, the price paid by them was fully specified in the deed of sale. The plaintiff brought an action against both of the vendees to enforce a right of pre-emption in respect of the whole sale within the period of limitation prescribed by law. It having been proved that C had assigned over his interest to a third party long before the institution of the suit, the Court, on the application of the plaintiff after the period of limitation had expired, ordered the assignee to be impleaded as a co-defendant. Thereupon the defence pleaded limitation. The Court allowed the plea in favour of the assignee, but decreed the suit for two-third of the claim against B. The latter appealed on the ground that part of the claim being dismissed as barred by limitation, the whole suit ought to have been dismissed as barred.

Held that the price and shares being distinctly specified, the sale was divisible, and the plaintiff was consequently not debarred from claiming the two-third share sold to B by reason of dismissal of his suit in respect to the one-third share sold to C.

Further appeal from the decree of W. A. Harris, Esquire, Additional Divisional Judge, Shahpur Division, dated 17th February 1906.

Nanak Chand, Sukh Dial and Ishwar Das, for appellant.

Kamal-ul-din and Nabi Bakhsh, for respondent.

The judgment of the Court, so far as is material for the purposes of this report, was delivered by

LAL CHAND, J.—The facts are given in full in the judgments of the Lower Courts. Briefly, Sikandar and others, co-sharers in mauza Jan Muhammad Nan, sold on 18th October 1900 for Rs. 8,000 their $\frac{1}{3}$ share of 9,304 kanals in the village to Brij Lal, appellant, and Bhag Singh and Asa Singh in proportion of two-thirds and one-third, respectively, the price paid by each set of vendee being specified. Massan, plaintiff-respondent, instituted the present suit for pre-emption on 15th October 1901 against

12th Jany. 1907.

the original vendees including Asa Singh and Bhag Singh, but the latter pleaded on 3rd February 1902 that they had re-sold their one-third share under the sale-deed to Hari Singh and others for Rs. 2,700 on 6th February 1901. Plaintiffs accordingly applied at once to implead the subsequent vendees as defendants, who, on 30th April 1902, pleaded that the suit as against them was barred by limitation, the period of one year having expired when they were joined as defendants. This plea was allowed by the District Judge in his final judgment, and the suit was decreed for two-third of the claim against Brij Lal, appellant. * * *

Plaintiff filed no appeal against the dismissal of his claim for one-third share, but Brij Lal, vendee, appealed to the Divisional Judge, contending that part of the claim being dismissed as barred by limitation, the whole suit ought to have been dismissed as barred, because plaintiff had failed to successfully assert his right as a pre-emptor over the whole of the property sold. *

* * *

The Divisional Judge disallowed the contention.

* * *

On further appeal by Brij Lal contending that the suit is barred * * *

* * *

We agree with the learned Divisional Judge that the suit against Brij Lal, vendee, is not barred as contended. It was argued that the sale is not divisible as held by the Divisional Judge, and *Kasar Singh v. Punjab Singh* ⁽¹⁾ and *Murad v. Mine Khan* ⁽²⁾ were relied upon to support the argument. But neither case is applicable to the circumstances of the present suit. In *Kasar Singh v. Punjab Singh* ⁽¹⁾ it was pointed out that "the solution of the question depends upon the intention of the parties at the time of sale, and this can only be gathered from a careful consideration of the contents of the deed." In that case it was found that the shares of the two vendees were given in the deed separately, but that the purchase-money for both was mentioned in lump. It was accordingly held that the sale was not divisible, as neither of the vendees could have sued to enforce the contract of sale for his share alone on payment of a proportionate share of the purchase-money, the vendor could

⁽¹⁾ 66 P. R., 1896,

⁽²⁾ 94 P. R., 1895,

have successfully resisted any such claim on the ground that he was not bound to take anything less than the whole amount. The question, whether the sale was divisible, did not arise directly in *Murad v. Mine Khan* ⁽¹⁾, and for the purposes of the point in dispute in that case it was not held to be divisible. In the present suit there is a distinct specification in the sale-deed of both price and shares, and there is no room for doubt on a consideration of the contents of the deed that the sale was intended to be separate in favour of Brij Lal and Asa Singh and his brother. This conclusion is strongly supported by the undoubted fact that a few months later Asa Singh and Bhag Singh, vendees of the one-third share, transferred on their own account their one-third share to Hari Singh and others for about the price they had originally paid. It was held by a Full Bench of the Allahabad High Court in *Ram Nath v. Badri Narain* ⁽²⁾ that it is immaterial whether the proportion of the purchase-money found or to be found by each of the vendees is or is not specified in the sale-deed. When the share of each vendee in the property sold is specified in the sale-deed, the actual property to which the right of pre-emption is attached is ear-marked and specified in the sale-deed. In the present instance even the price paid by each set of vendee is specified in the sale-deed. We have, therefore, no difficulty in holding that the sale in this case is divisible, and that the plaintiff is not debarred from claiming the two-third share sold to Brij Lal by reason of dismissal of his suit as regards the one-third share sold to the other vendees. It is unnecessary under the circumstances to discuss the view of law of limitation adopted in *Nabi Bakhsh v. Fakir Muhammad* ⁽³⁾. It appears to us at least open to further consideration in a proper case, but the question does not directly arise in the present appeal as the plaintiff did not appeal against the order of the First Court dismissing his suit for one-third share as barred by limitation.

⁽¹⁾ 94 P. R., 1895.⁽²⁾ I. L. R., XIX All., 148.⁽³⁾ 25 P. R., 1903.

No. 7.

Before Mr. Justice Reid.

SATGUN, (DEFENDANT),—APPELLANT,

Versus

BHAGWAN DAS,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 63 of 1908.

*Custom—Inheritance—Widow's right to succeed to her husband's collaterals—Brahmans of the Shakargarh tahsil, Gurdaspur District.**Found that by custom among Brahmans of the Shakargarh tahsil in the Gurdaspur District a widow was entitled to succeed collaterally for her life to any property to which her husband, if alive, could have succeeded.**Further appeal from the decree of S. W. Gracey, Esquire, Divisional Judge, Amritsar Division, dated 22nd July 1907.*

Beni Pershad, for respondent.

The judgment of the learned Judge was as follows :—

21st March 1908.

REID, J.—The main question for decision is, whether among Brahmans of the Shakargarh tahsil, Gurdaspur District, widows inherit collaterally for their lifetime. The Lower Appellate Court remanded this issue with the result that eight instances in favour of the custom were cited, and a mass of oral evidence in support thereof was adduced.

In six out of the eight instances, other heirs of the deceased, with rights apparently equal to those of the widow, existed. One instance only to the contrary, the decision of a Subordinate Court in 1877, has been cited.

Saddan v. Khemi (1), cited by the learned Divisional Judge, affords little assistance, the parties thereto being Johal Jats of the Jagraon tahsil, Ludhiana District, but I concur in the concurrent findings that the existence of the custom in question has been established. It is by no means an extraordinary custom. The other points taken have no force. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 8.

(*Before Mr. Justice Reid.*)

VIR BHAN AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

RAMJIDAS AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 635 of 1907.

Easement—Light and air—Obstruction—General principles.

Held that the rule of decision in an action in respect to a right to light and air obstructed by a permanent erection is whether, in consequence of the obstruction, the plaintiff has less light and air than before to such an appreciable a degree as to injure his property in point of value, comfort, convenience or usefulness, according to its character as a residence or a place of business or warehouse, and that an injunction is the proper remedy where substantial and wrongful injury has been done to the plaintiffs' rights.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Ambala Division, dated 29th December 1906.

Sheo Narain, for appellants.

Dwarka Das, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—This appeal and C. A 636 of 1907 can be disposed of together, having been disposed of by the Lower Appellate Court in one judgment, and the points raised in both being identical. The Lower Appellate Court has concurred with the Court of first instance in holding that the defendants-appellants' wall has made the two lower storeys of the plaintiffs-respondents' building unfit for the purposes for which they were built and used, and in ordering the defendants-appellants to remove their wall, at the point at which it began to interfere with the light and air of the respondents' building, 8 feet 8 inches further from that building, making 10 feet 9 inches interval in all, having fixed an angle of 45 degrees from the top of the wall as the angle which will admit sufficient light and air to the respondents' ground-floor room window. 11th April 1908.

The learned pleader for the appellants contended that the Lower Appellate Court has overlooked the true rule for decision in such cases, and that the angle fixed was arbitrary.

I am unable to hold that the findings are opposed to the rules laid down by their Lordships of the House of Lords in

Colls v. Home and Colonial Stores (1), and followed in *Kine v. Jolly* (2), and *Higgins v. Betts* (3).

These rules are (1) that the owner or occupier of a dominant tenement is entitled to the uninterrupted access, through his ancient windows, of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind, and that in these cases the question to be considered is, whether the obstruction complained of amounts to an actionable nuisance, the actual user neither increasing nor diminishing the right: (2) that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not, in law, justify an action, even though a large proportion of light previously enjoyed has been lost; that is, the interference with the access of light through the ancient windows of the plaintiff must be of such a character as sensibly to interfere with the comfort or convenience or usefulness of the building according to its character as a residence or a place of business or warehouse, or whatever else it may be, according to the ordinary notions of mankind, and unless it amounts to that, there is no cause of action, the mere deprivation of a certain percentage of light being insufficient for a suit, and in considering the sufficiency of the light, the locality and the light coming from other quarters should be considered.

Farwell, J., in the case last cited, held that the test of nuisance was not how much light had been taken, and whether that was enough to materially lessen the enjoyment and use which the owner previously had of the house, but how much was left and whether that was enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind. The questions involved were considered at considerable length in *Kirpa Ram v. Gurbakhsh* (4). Applying these rules to the findings of fact below, I see no reason for interference or for holding that pecuniary compensation would afford adequate relief. *Chota Lal Mohan Lal v. Lallubhai Sur Chand* (5), cited for the appellants, does not help them, the issues remanded by the Bombay Court having

(1) L. R., 73 L. J., Ch. 484.

(2) L. R., 74 L. J., Ch. 621.

(3) L. R., 74 L. J., Ch. 174.

(4) 2 P. R., 1893.

(5) I. L. R., XXIX Bom., 157.

been decided below. The order for the removal of the water spouts is obviously correct on the findings of fact.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 9.

Before Mr. Justice Reid.

SAWAN SINGH,—(PLAINTIFF),—APPELLANT,

Versus

SANT RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1127 of 1906.

Custom—Pre-emption—Pre-emption on sale of house property—Katra Amar Singh, Amritsar city.

Held that the custom of pre-emption in respect of sales of house property by reason of vicinage in Katra Amar Singh of the city of Amritsar had not been established.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 27th April 1906.

Sheo Narain, for appellant.

Beechey and Duni Chand, for respondent.

The judgment of the learned Judge was as follows :—

REID, J.—The suit for pre-emption of a house in Kucha 23rd March 1907. Kuttianwala was dismissed by the Lower Appellate Court on the ground that the *kucha* forms part of Katra Amar Singh, a distinct sub-division of the city of Amritsar. In Blythe's map of 1859 that *katra* appears as a separate sub-division, and no authority to the contrary has been cited for the appellant. *Mamon v. Ghauhsa* ⁽¹⁾, *Attar Singh v. Surt Singh* ⁽²⁾, *Lachman Das v. Kashi Ram* ⁽³⁾, and *Maula Bakhsh v. Devi Ditta* ⁽⁴⁾, cited by his pleader, do not help him, while *Labhu Singh v. Gurditta* ⁽⁵⁾ and *Sohava Mal v. Chattu Mal* ⁽⁶⁾ also cited are against him.

In *Labhu Singh v. Gurditta* ⁽⁵⁾ it was held that Katra Kanak Mandi, which appears on the map immediately to the east of, if

⁽¹⁾ 99 P. R., 1906.

⁽²⁾ 113 P. R., 1906.

⁽³⁾ 140 P. R., 1906.

⁽⁴⁾ 6 P. R., 1907.

⁽⁵⁾ 46 P. R., 1882.

⁽⁶⁾ 154 P. R., 1882.

not actually in, Katra Amar Singh, had been held by the courts below not to be part of Kila Bhangian, and that pre-emption in respect of sale of houses in that *katra* had not been established.

In *Sohava Mal v. Chattu Mal* it was held that the term "sub-division" includes what is known as a *katra* in the city of Amritsar.

In Civil Appeal 39 of 1905 a Division Bench of this Court held that Bag Jhanda Singh was included in Kila Bhangian. In the judgment it was remarked that *Jhanda Singh* was a *Bhangi*, round whose tomb houses had been built. No attempt was made by the appellant or his pleader (the latter went to another Bench of this Court leaving his client here) to establish by documentary evidence or authority the fact that Bag Jhanda Singh includes, or is included in, Katra Amar Singh, and the map of 1859 does not help either of these contentions.

The evidence on the record, brought to my notice, does not rebut the allegation that Katra Amar Singh is a separate sub-division for purposes of pre-emption, and no instance in this *katra*, except that referred to by the Lower Appellate Court, has been cited. That instance is not sufficient to discharge the burden of proof.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 10.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Chevis.

BANARSI DAS,—(DEFENDANT),—APPELLANT,

Versus

HAJI ABDUL GHANI,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 350 of 1907.

APPELLATE SIDE. }

Pre-emption—Right of pre-emptor to purchase a part when entitled to whole—Amendment of plaint.

Held that a person who, under the provisions of the pre-emption law, is entitled to pre-empt the entire bargain, *i.e.*, part of the property sold under one clause, and the remainder under another clause of the Pre-emption Act, forfeits his rights altogether, if he sues only for one portion, and in such a case where in spite of defendant's objection to the contrary, he persists in his suit as laid, he is not entitled to amend his plaint.

Miscellaneous further appeal from the order of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated 18th February, 1907.

Shadi Lal and Raj Narain, for appellant.

Shah Din, Muhammad Shafi and Sheo Narain, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—This appeal and Nos. 355, 356, 357, 358, 365, 366, 367 and 368 arise in closely connected suits against the same defendant, and it will be convenient to dispose of them all in one judgment. 4th June 1908.

The material facts are briefly these :

On 28th March 1906 the principal defendant, Banarsi Das, appellant in this case, purchased a large plot of land, at Delhi, with buildings standing on it.

On 31st August 1906 Haji Abdul Ghani, who was an unsuccessful competitor for the purchase, and who is, or is said to be, owner of the superstructure in six buildings standing on part of the land sold, instituted a suit for pre-emption of the sites under the buildings. Four other such suits were instituted against the vendees by four persons having similar rights, for four distinct plots out of the land sold, on the same date. The cases were tried together by the District Judge of Delhi.

The defendant filed oral as well as written pleas contending *inter alia* that the plaintiff had not sued for all that he was entitled to pre-empt according to his own allegations, and that his suit ought, therefore, to be dismissed. The District Judge first took up for consideration issues 1, 5 and 6, covering this and two other points urged against the plaint, which it is unnecessary to mention here, as they have not been pressed before us. He decided the latter in favour of the plaintiffs, but the former against them, and dismissed their suits.

The plaintiffs appealed to the Divisional Judge contending that their suits were properly framed, and that they had claimed all they were entitled to pre-empt. The Divisional Judge agreed with the finding of the District Judge, and held that the suits did not include all that plaintiffs were, on their own showing, able to sue for, but he remanded the cases under Section 562, Civil Procedure Code, for amendment of the plaints by plaintiffs, and for fresh trial thereafter. Against this order nine appeals have been preferred.

The present appeal is by the vendee Banarsi Das in Abdul Ghani's case objecting to the remand and the order for amendment, and there are four similar appeals by him in the cases of the four other plaintiffs, *viz.*, Nos. 365 to 368. These plaintiffs have also filed appeals against the said order, *viz.*, Nos. 355 to 358, and have not amended their plaints according to the direction of the Divisional Judge. Haji Abdul Ghani, however, has complied with the order of the learned Judge and amended his plaint, by suing for the entire property sold, and deposited one-fourth of the purchase-money. He has filed no appeal, but was allowed by us to argue in support of his original claim on the assumption that the amendment was not admissible. This was permitted in order to enable us to finally dispose of the suits in case we disagreed with the Divisional Judge's view. The appeals have been elaborately and exhaustively argued by the parties' counsel for two days.

The defendant likewise denied the existence of the custom of pre-emption in the locality, and further pleaded that the property sold is in the nature of a *katra* or *serai* and not subject to pre-emption. These points were put in issue (*vide* issues 2 and 3 of the District Judge), but they have not been inquired into or decided. They come first in logical order, and their decision in defendant's favour would have rendered the adjudication of the point on which the District Judge's judgment proceeds unnecessary. But the District Judge decided, without objection by either plaintiff or defendant, to inquire into and dispose of issues 1, 5 and 6, and fixed the 16th October 1906 for that purpose. On that date the matter was argued and judgment was delivered on the 18th dismissing the claim on the finding on issue 6. No objection was taken to the District Judge's procedure before us, and we accordingly proceed to dispose of the appeals on the principle adopted by the Lower Courts.

The first point for determination in these appeals thus is, whether the plaintiffs were entitled and bound to sue for a larger portion of the property sold than they did.

The argument for the plaintiff was that they sought to pre-empt the sites under the superstructures belonging to them by virtue of a special clause of the Punjab Pre-emption Act, *viz.*, clause (2) of Section 13, and they could claim nothing more. It was urged that such superstructures do not come within the definition of immoveable property, and clause (7) cannot,

therefore, apply to them. It was further urged in the last resort that, assuming that a claim would lie on the ground of adjacency under the 7th clause, such a claim and one under clause 2 are essentially distinct and need not be joined, and that the non-joinder of such claims does not contravene the rule that a pre-emptor must sue for all the property to which his right attaches.

As regards the contention that plaintiffs have no right under clause (7th), we are of opinion that a standing building is immoveable property under the Punjab General Clauses Act, there being no definition of the term in the Pre-emption Act, and the contest also not being repugnant to such an interpretation. In common parlance the same expression is used with reference to such property. This is the opinion also of the Lower Courts, and nothing cogent has been brought forward against it. No general argument about strictly construing the Pre-emption Act, and not extending the right of pre-emption, can avail against the ordinary rule of attaching the usual meaning to words used in a statute where it has not been employed in a special or technical sense. We accordingly hold that this contention fails. The other point, *viz.*, that the rights arising as they do under different clauses need not be joined, was very strongly and ably pressed, but appeared to us to be quite untenable. The right of pre-emption exists in a potential form with respect to immoveable property in a particular person or persons before the sale of such property takes place and becomes an actuality at the completion of the bargain. It is a right in fact to take advantage of the contract of sale, and to be substituted for the purchaser if he has not a similar right. The right is given by law and attaches, as a whole, to all the property comprised in the sale to which it applies. It follows that all such property must be acquired, *i.e.*, the contract must be availed of, and the substitution sought for to the fullest extent of the right. This is dictated by equity and common sense and is settled by an overwhelming weight of authority, and indeed is not disputed. The distinction sought to be drawn on the ground that the right arises under two different clauses of Section 13, and that the claims, therefore, need not be joined, has no substantial foundation. When the sale took place, the right of acquisition of the bargain and of substitution in place of the purchaser arose, *ex hypothesi*, at once. The seller was under an obligation to sell all the property to which the plaintiff's right attaches on either ground. He could not differentiate between the foundations of the plaintiff's right. His sale to a stranger,

who had no right of any kind at all to purchase, was a breach of the obligation, and it was clearly a single act, and it is this breach which is really the plaintiff's cause of action. Indeed both the obligation and the breach of it were single in this instance, and we cannot, for a moment, accede to the contention of plaintiff's counsel that separate suits could have been brought in respect of the properties covered by the two clauses.

The several clauses of Section 31 define the priorities of different claimants in respect of the different classes of property mentioned, and do not affect the singleness of the seller's obligation to sell to a person entitled to pre-empt under more than one clause. It follows that where a pre-emptor of this class sues for pre-emption of property falling under one clause and omits to sue for other property falling under a different clause but included in the same sale, he offends against the vital canon of pre-emption law which prescribes that he must acquire the entire bargain as far as his right extends.

There is ample authority against the contention and in support of the view we are disposed to take. *Muhammad Wilayat Ali Khan v. Abdul Rab and another* ⁽¹⁾ is a case much in point. There the properties comprised in the sale were situate at different places, and plaintiff had rights of pre-emption in regard to both, but under totally different laws, and precluded himself from suing for one of the properties under the law of pre-emption applicable to it. It was held that he could not sue to pre-empt the other property. *Durga Prashad v. Munshi* ⁽²⁾ is another case of the same nature. Here also plaintiff had rights on two different grounds and sued for a portion of the property sold under one ground. His suit was dismissed. It is unnecessary to multiply precedents in support of a conclusion based on equity, reason and sound sense.

We hold accordingly that the suits of all the five plaintiffs were bad, in that they did not seek to acquire all that they could pre-empt. This involves the rejection of appeals Nos. 355 to 358, which are accordingly dismissed with costs.

The next point for consideration is that raised in the five remaining appeals, *viz.*, whether the Divisional Judge was justified in permitting amendment of the plaints. There is no necessity

⁽¹⁾ I. L. R., XI All., 108.

⁽²⁾ I. L. R., VI All., 423

to enlarge much on it. The rule that a suit for pre-emption must include all property comprised in the sale to which the plaintiff's right of pre-emption extends, is a most stringent one and non-observance of it is fatal to the suit. Here the plaintiffs strenuously insisted that their right extended only to what they claimed and no more, and in spite of defendant's plea to the contrary persisted in their suits as laid and never asked leave to amend in the First Court. On appeal they raised exactly the same contention, and never prayed for amendment, and fought out their cases in the Divisional Court on that basis. When the Divisional Judge decided against their contentions, they had no rational claims to ask for permission to amend their plaint in terms of the defendant's objection. And it does not appear that they really asked for leave. Four of the plaintiffs, other than Abdul Ghani, actually filed appeals here objecting to the order for amendment, and again took their stand on their original contentions. It is obvious that in so far as they are concerned, there is absolutely no case for amendment, and the Divisional Judge's order is clearly wrong.

We must accordingly accept appeals Nos. 365 to 368, reverse the Divisional Judge's orders of remand under Section 562, Civil Procedure Code (which are correct in form and can, therefore, be considered on the merits), and restore the decrees of the First Court with costs in all the Courts.

There remains the present appeal against plaintiff Abdul Ghani, who has carried out the order for amendment. His case is exactly similar to that of the other plaintiffs, except for the above fact. He has also filed an affidavit to the effect that leave to amend was asked for in the Divisional Court. These circumstances, however, do not really differentiate his case. The law regarding pre-emptors being required to sue to acquire the bargain of sale to the fullest extent of their right being a stringent one, he disobeyed it or omitted to comply with it at his peril. He fought out the question of his right to sue as he did in two Courts, and never so much as hinted at amendment until at all events his contention was overruled by the Court of appeal. Is it right in the circumstances to allow him to amend? Without attempting to lay down a hard and fast rule or to unduly fetter the discretion of the Court, we think, on the whole, that he ought not to have been given permission. The scope of the suit has been changed considerably, and the value of it largely enhanced. Defendant

is entitled to ask that he should get the benefit of the decision on the plea advanced by him after the strenuous fight he has had to make in order to make it good. It is a matter of regret that the present plaintiff will be put to some loss in consequence of his carrying out the Divisional Judge's order if the amendment is disallowed, but this does not seem to be a sufficient ground for permitting it under the circumstances of this case.

We accordingly accept this appeal, and, reversing the Divisional Judge's order, dismiss the plaintiff Abdul Ghani's case with costs in all the Courts,

Appeal allowed.

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No. 11.

Before Mr. Justice Reid.

KARM SINGH,—(PLAINTIFF),—APPELLANT,

Versus

MOHAMMAD DIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 67 of 1907.

Alienation by male proprietor of ancestral land—Suit by reversioner to recover possession of such land—Limitation—Punjab Limitation Act, 1900—Onus probandi as to the inapplicability of the Act.

Held that the onus of proving the inapplicability of Punjab Limitation Act, 1900, to a suit by a reversioner of a male proprietor, to recover possession of ancestral land alienated by such proprietor, on the ground that the sale was made without any legal necessity or consideration, lies upon the plaintiff, who should satisfy the Court that the cause of action had accrued to him before that Act came into operation.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 21st December 1905.

Kamal-ud-din, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—It is admitted that the alienee took possession in 1889, and the suit, instituted on June 1st, 1905, is barred by limitation under the Punjab Limitation Act, I of 1900, unless the cause of action arose, on the death of the alienor, before the Punjab Act came into force.

APPELLATE SIDE. }

6th April 1908.

An issue as to the date of the alienor's death was remanded, and the finding of the Lower Appellate Court is that the evidence adduced is unreliable, and that it is impossible to fix the date of the death, which took place, if it has taken place, at some date subsequent to the alienation of 1889.

The terms of the Punjab Act have, in my opinion, had the effect of shifting the burden of proof, which, under Article 144 of the Limitation Act, was on the person setting up adverse possession as his title, *I arma Nand Misr v. Sahib Ali* (1), (page 443), and the appellant had to prove that the Punjab Act was inapplicable by reason of the death of the alienor before it came into force. This burden the appellant has failed to discharge, and I have no alternative in concurring in the finding of the Courts below that the suit is barred by limitation. The appeal fails and is dismissed, but having regard to the circumstances of the case and the appellant's position I leave the parties to bear their own costs of this Court.

Appeal dismissed.

No. 12.

*Before Sir William Clark, Kt., Chief Judge, and
Mr. Justice Reid.*

SHIB DIAL,—(PLAINTIFF),—APPELLANT,

Versus

CHIRAGH BIBI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 338 of 1907.

Jurisdiction of Civil or Revenue Court—Landlord and Tenant—Ejection of tenant in execution of a Revenue Court decree—Suit by tenant in Civil Court for recovery of possession of land other than that leased to him—Res judicata—Competency of Civil Court to try subsequent suit.

Held that a suit for recovery of possession by a tenant who had been ejected in execution of a decree of a Revenue Court, on the allegations that the decree in question included, in addition to the land leased to him, other plots over which he had either rights of occupancy or had become proprietor by long adverse possession, is cognizable by a Civil Court only, and the decree of the Revenue Court cannot operate as *res judicata*, that Court having no jurisdiction to try the present suit.

Further appeal from the decree of H. P. Tollinton, Esquire, Divisional Judge, Lahore Division, dated 12th February 1907.

Sukh Dial, for appellant.

Obedulla, for respondent.

The judgment of the Court was delivered by

28th March 1908. REID, J.—The plaintiff-appellant sued for possession of 8 kanals 6 marlas, alleging that he was occupancy tenant of 6 kanals 18 marlas belonging to the defendants-respondents, and had become proprietor of the remaining 1 kanal 8 marlas by long adverse possession.

He took some land on lease from the respondents, who sued for his ejection in a Revenue Court and obtained a decree, which included the land in suit in the land from which the appellant was to be ejected. He was ejected accordingly in execution. In the present suit he alleged that the land in suit was included in the Revenue Court's decree by mistake and without his knowledge, and that it was not included in the land leased to him. The Court of First Instance gave him a decree and the Lower Appellate Court set aside this decree and dismissed the suit, on the ground that the suit constituted an appeal from a decree of the Revenue Court and was not cognisable by a Civil Court.

The sole questions for consideration are, whether the jurisdiction of the Civil Courts has been ousted by the Tenancy Act, and whether Section 13 of the Code of Civil Procedure bars the suit.

In *Joti v. Maya* (1) at pages 238-239, Plowden, S. J., said :
 “ The test under the Tenancy Act, whether a person has or has
 “ not become a tenant (with or without a right of occupancy),
 “ is whether such person, having the right to enter upon and
 “ possess particular land, has or has not entered into possession
 “ in pursuance of that right. If such person has entered, he
 “ is a tenant. If, after he has entered, his title to a right of
 “ occupancy is in dispute, then a suit by him to establish
 “ it, or by the landlord to disprove it, falls under clause (d)
 “ of Section 77, and is cognisable by a Revenue Court.

“ If, having entered, he is wrongfully dispossessed, he does
 “ not cease to be a tenant, and may bring the suit described in
 “ clause (g) of Section 77, as a suit under Section 50 for
 “ recovery of possession, cognisable by a Revenue Court.

(1) 44 P. R. (F. B.), 1891.

“ If such person has not entered, his suit for entry into possession, whether he claims a right of occupancy or not, is not cognisable by a Revenue Court, but by a Civil Court only.”

In *Kesar Singh v. Nihal Singh* ⁽¹⁾ the plaintiffs, claiming that they were occupancy tenants dispossessed by their landlord more than a year before suit, sued for possession of their occupancy holding. The Court considered the ruling above cited and held that, for the purposes of the Tenancy Act, a tenant who had been dispossessed could, for the period of one year from the date of his dispossession, claim to be still regarded as a tenant, *quoad* his landlord, his suit for recovery of possession being (as expressly provided) cognisable by the Revenue Court, that if he allowed the period of one year to elapse without making any claim, he must be taken (subject to any recognised disability) to have relinquished his right to be still regarded as a tenant, and that his remedy (if such still existed, as to which it was not necessary to give an opinion upon the reference to the Full Bench), must be sought in the Civil, and not in the Revenue Court: that the suit was consequently cognisable by the Civil Court, it being no longer possible to describe the suit as one between the tenant and landlord. In *Thakar Gir v. Baisakhi* ⁽²⁾ it was pointed out that, reading Sections 42, 43, 44, 45 and 77 (3) (f) of the Tenancy Act together, it was open to any one to assume the status of landlord in respect of any particular land occupied by any other person and to apply for that person's ejectment as his tenant and that that person would be ejected if he did not sue to contest the notice of ejectment or failed in such suit.

In *Imam Din v. Feroz Khan* ⁽³⁾, it was held that Section 50 of the Tenancy Act did not restrict the period of limitation for a suit in the Civil Courts by a dispossessed occupancy tenant for possession. The Court set aside the Lower Appellate Court's finding that the suit was barred by limitation and decreed the suit.

The conclusion to be drawn from these authorities is that the Revenue Court which decreed the appellant's ejectment had not jurisdiction to entertain the suit now filed by the appellant, which is exclusively cognisable by the Civil Courts.

⁽¹⁾ 45 P. R. (F.), 1891.

⁽²⁾ 3 P. R., 1895.

⁽³⁾ 64 P. R., 1898.

Atar Singh v. Rala Singh (1) and *Banwari Lal v. Mussammatt Gopi* (2) cited for the respondents, do not help them. In the former it was unnecessary to consider the questions now involved and they were not considered. The latter turned on a local statutory provision limiting the period for a suit in a Civil Court for the determination of a question of title, and is not in point.

Sultan Habibulla Khan v. Mohobat Khan (3), *Gangaraju v. Kondireddiswami* (4) and *Gomti Kunwar v. Gudri* (5) are ample authority for the conclusion that the decree of the Revenue Court was, by reason of that Court's inability to entertain the present suit, no bar, under Section 13 of the Code of Civil Procedure, to the suit proceeding.

We decree the appeal, set aside the decree of the Lower Appellate Court and, under Section 562 of the Code of Civil Procedure, remand the appeal to the Lower Appellate Court for decision.

Court fee on the memorandum of appeal will be refunded and other costs of this Court will be costs in the cause.

Appeal allowed.

No. 13.

Before Mr. Justice Chatterji, C.I.E.

GOPAL SAHAI,—(PLAINTIFF),—PETITIONER,

Versus

BELI,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 420 of 1907.

REVISION SIDE. }

Cantonments House Accommodation Act, 1902, Sections 21, 26, 28, 34—Military tenant to require reference to arbitration—Constitution of Committee of Arbitration—Authority of District Magistrate to appoint a member in place of a nominee of a party—Finality of the decision of a Committee improperly constituted.

Held that a District Magistrate has no right to appoint a member of a Committee of Arbitration under Section 28 of the Cantonments House Accommodation Act, 1902, in the place of a nominee of a party who had declined to act on the ground of unsuitability of the time fixed for the

(1) 139 P. R., 1906.

(2) I. L. R., XXX All., 44.

(3) I. L. R., XXV All., 138.

(4) 68 P. R., 1901.

(5) I. L. R., XVII Mad., 106.

meeting, but was willing to act if another date was fixed, without first calling upon the party concerned to nominate another member in his place, and the latter had failed to do so within the period allowed to him by law.

A Committee of Arbitration constituted in violation of the provisions of the Act has no legal existence and no powers of a Committee of Arbitration, and its actions are simply *ultra vires* and must be disregarded by Courts of Law.

Query.—Is it competent to convene a Committee of Arbitration under the Act when the requisition comes from a Military Officer who is not a tenant but intends to lease?

Petition for revision of the order of Major W. G. Hodgson, Judge, Cantonment Small Cause Court, Multan Cantonment, dated 8th January 1907.

Gurcharan Singh, for petitioner.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—This was a suit in the Cantonment Small Cause Court, Multan, for recovery of Rs. 240 being the rent for four months of a bungalow belonging to the plaintiff and occupied by the defendant. The defendant pleaded that the rent was fixed at Rs. 40 a month by a Committee of Arbitration convened under the Cantonment (House Accommodation) Act, II of 1902, and that nothing more is claimable. 31st July 1907.

The Judge, Cantonment Small Cause Court, held that the award of the Committee was binding, and decreed Rs. 160. In the present application the plaintiff asks that the decree may be revised under Section 25 of the Provincial Small Cause Courts Act, 1887, on the ground that the decision of the Committee of Arbitration was *ultra vires* as (1) it was not properly convened, and (2) was not properly constituted, and is therefore not binding.

The material facts are briefly these. The plaintiff has a bungalow No. 60 in the Multan Cantonment, and the defendant, Captain Bell, wishing to occupy it wrote to the Cantonment Magistrate on 21st March 1905, asking for a Committee of Arbitration to be convened in order to fix the rent of the house, as he considered the rent then fixed which was Rs. 60 a month all the year round was too high. He also said he was moving into the house under protest, and had written to the landlord to that effect.

This was forwarded by the Cantonment Magistrate to the Commanding Officer of the station on 22nd March. On

25th March the Commanding Officer passed an order convening the Committee of Arbitration under Section 26 (1) of the Act, *vide* Brigade Order 1068.

The agent of the plaintiff was required to nominate a member for the Committee, but on 27th March he wrote saying he had no power to do so without the order of the plaintiffs. Ultimately, however, Mr. M. N. Banerji, Pleader, Multan, appears to have been appointed for the plaintiffs, and he was informed by the Cantonment Magistrate of the fact and requested to attend the meeting of the Committee at the bungalow (No. 60) at noon of the following day. Mr. Banerji refused to act as he was engaged on that day but agreed to the appointment if another date was fixed for the meeting, *vide* his letter, dated 1st April 1905.

The Arbitration Committee, however, met at the appointed time, and the District Magistrate, who was *ex-officio* the Chairman of the Committee, appointed Major Gordon, R.G.A., member for the owner as Mr. Banerji had declined to act.

The award was made the same day, and Rs. 480 a year was fixed as the rent, and the owner was further made liable for certain repairs.

The plaintiff brought this suit on 3rd August 1905. It was dismissed on 31st October 1905 on the ground that no suit lay against the defendant, and that plaintiff should sue the Cantonment authority. This decree was reversed by Mr. Justice Kensington on 12th November 1906, and the case remanded for decision on the merits. Thereupon the Judge has passed the order under revision.

The objection as to the Committee not having been properly convened is based on the fact that Captain Bell was not a tenant of the owner when he asked for a Committee. He occupied the house under protest about rent at the same time that he had asked for a Committee. The facts relating to this objection are not quite clear on the record, and as I am of opinion that the case can be disposed of on the second objection, I proceed to discuss the latter.

The essence of this objection is that the plaintiffs on the requisition of the Cantonment authority nominated a member, Mr. Banerji, who declined to act. The plaintiffs, therefore, ought to have been served with notice to appoint another in his place and only in case of their failure to do so within seven days, could the District Magistrate appoint one to take the place of

the nominee of the owner, *vide* Section 28, second proviso, clause (ii). Here, as already stated, the order for convening the Committee was passed on 25th March and the meeting was fixed for the 1st April. Mr. Banerji received notice of appointment on 31st March and conditionally declined that very day, his objection being as to the time fixed and not to the office itself.

It appears that the plaintiffs never had seven days' time allowed them to make a nomination as the date fixed for the meeting precluded this being done or any notice or time to appoint another person in place of Mr. Banerji. The result was that plaintiffs were never able to exercise the right reserved to them by the action of the Cantonment authorities and the District Magistrate. The appointment of Major Gordon by the District Magistrate was without authority.

The Judge admits that seven days' notice should have been given to plaintiff under the Act, but considers that the irregularity does not vitiate the decision of the Committee of Arbitration.

I am unable after consideration to agree with the learned Judge. In the first place I consider that the omission was not a mere irregularity but a patent illegality and an act *ultra vires* on the part of the District Magistrate, for the conditions which authorize an appointment by him did not exist and the appointment was not competent. Major Gordon, therefore, had no status as member on behalf of the plaintiff, and the Committee was really composed of only two members and was thus not legally constituted. It had, therefore, no authority to enter into the matter to decide which it had been convened, and its decision was a nullity and not binding on any one.

I think this clearly follows from a consideration of the Act and the dates I have given. It is obvious when a special measure of this kind is enacted and a special authority constituted to exercise the exceptional powers provided in the Act by which the ordinary legal rights of property of the owner are set aside, and he is deprived of the right of resort to courts of law for relief, it is absolutely essential to provide all the safeguards prescribed by the law for the protection of the owner's rights and to strictly comply with the procedure laid down. The Act did not contemplate nor authorize action being taken by two members when it requires three. Each of the three members must be such as come within the terms of the Act and no others can take their place. If the

member for the owner is not appointed, the Committee is no Committee, and unless the member for the owner is appointed by him or by District Magistrate under powers granted by the Act he is no member at all. This is why I regard the Committee as composed of only two members, and as such, it had no legal existence and no powers of a Committee of Arbitration under the Act.

Authority for the positions above stated is hardly required as they are obvious from a consideration of the principles of construction of statutes. Act II of 1902 is an enabling Act, and introduces a new law directing certain things to be done in a certain way and attaching a special effect to acts so done. It is obvious the provisions are absolute and not merely directory. The great principle regulating the interpretation of such a Statute is that where the agency created by the Statute acts, in accordance with the procedure laid down for it, such acts have the effect and the finality which are given to them by the law. If, however, it fails to comply with the essential requisites of such procedure the acts are *ultra vires* and can be set aside or disregarded by the courts of law. "The conditions in an enabling Act which have been prescribed for the purpose of protecting or benefiting the public cannot be dispensed with"—Hard Cooke on Statute Law (3rd Edition, 272). Thus it has been held that where Municipal Committees are authorized by law to do certain acts for the better government and improvement of the area put under their control, they may do such acts in the exercise of their statutory power even to the injury of private rights, and they cannot be interfered with, but if they violate the proper procedure prescribed for such acts or use their powers capriciously and in an oppressive manner their action can be impugned and set aside. See *Ibrahim v. The Municipal Committee of Lahore* (1), *Badri Das v. Municipal Committee, Delhi* (2), *Ali Mardan v. The Municipal Committee of Kohat* (3), and *Nagar v. Municipality of Dhandhuka* (4).

The best illustration of what I am saying is furnished by the interpretation of Section 20 of the Northern India Canal and Drainage Act by this Court. That section prescribes that certain acts of specified canal authorities done in a certain manner are conclusive. Where, however, the procedure was

(1) 52 P. R., 1900.

(2) 90 P. R., 1898.

(3) 45 P. R., 1905.

(4) I. L. R., XII Bom., 490.

not followed this Court held that the order of the Canal authority was not binding and set it aside. See *Kadir Bakhsh v. Bhagat Ram* (1) and *Bhambu Ram v. Chatta Mal* (2).

The Committee of Arbitration is vested with exceptional powers which enables it to act in derogation of the rights of private ownership for certain purposes. The procedure prescribed clearly has it in view that the owner shall have a representative in the Committee who shall protect his interests fairly and put the rights of his case before the Committee. Unless the owner is contumacious and wilfully declines or neglects to appoint a member, he has the right of such appointment, and a certain time is allowed to him to exercise that right. When he does not get the option of appointment and where in consequence he is practically unrepresented, a primary object of the procedure laid down by the Act is violated and the Committee is legally no Committee at all and its acts are void. The decision given by the Committee appointed in this case is, therefore, not final under Section 34 (3) of the Act.

There is no estoppel under Section 115 of the Evidence Act established against the plaintiffs-petitioners which precludes them from contesting the decision.

The decree of the Judge based on the decision cannot stand. I set it aside and remand the case to him for a decision on the merits in accordance with law.

Costs to abide the event.

Application allowed.

No. 14.

Before Mr. Justice Chatterji, C.I.E., and Mr. Justice Rattigan.

RANJHA,—(PLAINTIFF),—APPELLANT,

Versus

BULANDA,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1387 of 1907.

Custom—Inheritance—Pagvand or chundavand—Gujars of mauza Hailakh, tahsil Shakargarh, Gurdaspur District.

Found in a suit the parties to which were Gujars of mauza Hailakh in the Shakargarh tahsil of the Gurdaspur District that they were governed by the pagvand and not by the chundavand rule of succession.

(1) 71 P. R., 1888.

(2) 144 P. R., 1894.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated 1st October 1907.

Gulu Ram, for appellant.

The judgment of the Court was delivered by

24th July 1908.

CHATTERJI, J.—The plaintiffs are four sons by one wife of one Dalmir, a Gujar, landowner of Hailakh in the Shakargarh *tahsil* of the Gurdaspur District, while defendant is his single son by another wife. The dispute between the parties is as to the application of the rule of *pagvand* or *chundavand* in the division of the paternal estate, and the plaintiffs have sued for a declaration that the former governs them. On the death of the father mutation was made in the parties' names on the *chundavand* principle in 1899, but plaintiffs have held possession of a much larger portion of the land than the defendant, the *khata* being joint. The defendant in consequence applied for partition in 1906 in accordance with the revenue entry and plaintiffs objecting to it have been referred to the Civil Court and have accordingly brought the present suit.

In the *Riwaj-i-am* of 1865 of the Shakargarh *tahsil* it was recorded that *chundavand* was the custom of the Gujar. The parties' father wrote a will in 1898, a few months before his death, in which he stated that though the old custom was *chundavand* he considered that all sons should get equal shares, and directed that division should take place on this principle after his death. The inquiries made at the time of the last Settlement however showed that the custom had largely fallen into disuse, and it was recorded that the custom of the Gujar except in a very few villages was *pagvand* (*vide* Dane's Customary Law of Gurdaspur, page 13). What those villages are it is not possible to discover from the present record or from the vernacular records of customs in the Chief Court. But it is evident from Mr. (now Sir Louis) Dane's summary that the great majority of the Gujar stated at the time of the recent Settlement that their custom was *pagvand* and not *chundavand*. The later record is quite as valuable as the earlier *Riwaj-i-am* if not more so, and we do not see why it should be an inflexible presumption that the previous *Riwaj-i-am* correctly records the custom. Had the village of Hailakh been among the exceptions noted in the new *Riwaj-i-am* or in the answers of the Gujar tribesmen the parties would probably have brought out the fact. As the case stands at present we are inclined to think that the old record of custom is sufficiently rebutted by the new one.

The mention of the *chundavand* rule in the father's will may be a point in favour of defendant's contention, but he is, perhaps, referring to the entry in the old *Riwaj-i-am*, and he also mentions the contrary practice as entered in the settlement records. He wrote apparently in ignorance of the answers given at the last Settlement. His statement therefore does not weigh much under the circumstances, and he clearly gives preference to the new rule that had come into vogue. We do not think the will can materially influence the decision of the case.

The oral evidence of the parties is not of much value by itself, but a much larger number of persons have deposed in favour of the plaintiff's contention, while only two witnesses appeared for the defendant.

The Naib Sadar Kanungo deposed to two recent instances in support of the rule of *pagvand* from the revenue records, and copies of two other mutation entries from two other villages of the Shakargarh *tahsil* have been produced to the same effect. There is also an old case of 1873 in which the plaintiff after suing for division according to *chundavand* ultimately agreed to take his share under the *pagvand* rule. Dane's Customary Law gives these instances as well as many more among Jats of Shakargarh, Batala, Gurdaspur *tahsils*.

On defendant's side there is only one alleged instance deposed to by Imam Din, lambardar, who says he got a half share of his father's property and his two half brothers the other half, and that mutation took place to this effect two or three years ago. The entry itself was not produced and the instance depends entirely on the statement of this witness.

It has been laid down in several judgments of this Court that *chundavand* is slowly giving place to *pagvand* wherever it was in force; see *Hukam Singh v. Sochet Singh* ⁽¹⁾ and *Kundan v. Sundar Singh* ⁽²⁾. The inquiries made at the recent Settlement seem to bear out this conclusion. The binding force of custom depends on the state of public opinion. It is undoubted as stated in *Dhyan Chand v. Mehtab Singh* ⁽³⁾ that *pagvand* is the universal customary rule and is the only one recognized by the personal law of Hindus and Muhammadans, and *chundavand* is the exception, though it may date from ancient times,

(1) 134 P. R., 1892.

(2) 74 P. R., 1898.

(3) 101 P. R., 1879.

see also *Sant Singh v. Sohan Singh* (1), *Kundan v. Sundar Singh* (2), *Gopal v. Shawag Ram* (3), *Ghulam Muhammad v. Abbas Khan* (4), and *Hayat Muhammad v. Nawab* (5). An exception to the ordinary rule may become obsolete by not being enforced.

In a recent case *Labh Singh v. Sundar Singh* (6) from the Gujranwala District among people who were alleged to have come from Gurdaspur we have had occasion to discuss the question arising in this case. For the reasons given in our judgment in that case in addition to what we have said above we think that the rule of *chundavand* if it was in force among the parties' tribe and family, has fallen into disuse, and that the present rule is *pagvanl*.

We accept the appeal and restore the decree of the first Court. In consideration however of the peculiar circumstances of the case and the mutation entry in defendant's favour which has not been challenged for several years, we let the parties pay their own costs throughout.

Appeal allowed.

No. 15.

Before Mr. Justice Robertson and Mr. Justice Kensington.

GHULAM HASSAN,—(PLAINTIFF),—APPELLANT,

Versus

FAZAL DIN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 653 of 1906.

Custom—Inheritance—Rights of daughter to succeed to her father in presence of collaterals—Muhammadian Parachas of Bhera city.

Found that by custom among Muhammadian Parachas of the Bhera city, daughters are entitled to succeed to the urban immovable property of their father to the exclusion of his male collaterals.

Further appeal from the decree of W. A. Harris, Esquire, Additional Divisional Judge, Shahpur Division, dated 27th November 1905.

Nanak Chand, for appellant.

Bodhraj Sawhny, for respondent.

(1) 46 P. R., 1897.

(2) 74 P. R., 1898.

(3) 12 P. R., 1899.

(4) 22 P. R., 1899.

(5) 29 P. R., 1900.

(6) 151 P. R., 1909.

The judgment of the Court was delivered by

ROBERTSON, J.—After hearing counsel for the appellant at 26th April 1908. length and examining the record we are of opinion that the learned Divisional Judge has come to a correct finding that no custom has been proved under which among Muhammadan Parachas of the Bhera city, as regards property within the city, collaterals have a right to succeed in preference to daughters. That being so the Lower Appellate Court rightly fell back upon the Muhammadan Law. It is extremely probable that the Parachas of Bhera do not follow the rules of succession laid down by Muhammadan Law with any approach to completeness. It is possible that their custom has so far modified that law as to allow sons to exclude daughters, that is their sisters, altogether from inheritance. This is a condition of affairs known to exist in some other cases. But a careful examination of the evidence on both sides leads us to conclusion that the learned Divisional Judge is right in holding that daughters succeed in preference to collaterals. There were numerous instances shown in which this has been the case, and the instances put forward in support of a contrary custom were nearly all cases of the exclusion of sisters by brothers only. We have not thought it necessary to call upon the respondent for a reply. The appeal fails and is dismissed. Each party to bear their own costs in this as in Appeal No. 652.

Appeal dismissed

No. 16.

Before Mr. Justice Robertson.

RAM LAL AND OTHERS,—(JUDGMENT-DEBTORS),—
APPELLANTS,

Versus

MACKENZIE,—(DECREE-HOLDER),—RESPONDENT.

Civil Appeal No. 522 of 1907.

Arrest and imprisonment—Judgment-debtor on arrest to be informed that he may apply for discharge—Civil Procedure Code, 1882, Section 336—Notification No. 3860.

Held that whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under Section 336, Civil Procedure Code, the Court is bound to inform him as laid down in Notification No. 3860, that he may apply under Chapter XX to be declared an insolvent

} APPELLATE SIDE.

and that he would be discharged if he has not committed any act of bad faith regarding the subject of his application and places all his property in possession of a receiver appointed by the Court.

Miscellaneous further appeal from the order of H. Scott Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 12th February 1907.

Hukam Chand, for appellants.

Balwant Rai, for respondent.

The judgment of the learned Judge was as follows :—

7th August 1907.

ROBERTSON, J.—The Notification of the Punjab Government under Section 336, Civil Procedure Code, is clear and peremptory. Whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent. This must be done before any enquiry is made by the Court. Procedure in insolvency is different from procedure in execution, and the District Judge was bound to carry out the provisions of Section 336 as notified in Notification No. 3860 (page 2 of Volume I of Chief Court Rules and Orders). This must be done and the Judge had no power to avoid it. I accordingly set aside the order of imprisonment and direct the Judge to proceed according to law under Section 336.

Application allowed.

No. 17.

Before Mr. Justice Robertson.

KHUDA BAKHSH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

IMAM DIN AND OTHERS,—(PLAINTIFFS),—RES-
PONDENTS.

APPELLATE SIDE.

Civil Appeal No. 1296 of 1906.

Custom—Alienation—Sale by male proprietor—Kashmiris of mauza Panjorian, Gujrat District—Burden of proof.

Held that the plaintiff, upon whom the *onus* lay, had failed to establish that in matters of alienation the Kashmiris of mauza Panjorian in the Gujrat District were governed by custom and not by Muhammadan Law.

Miscellaneous further appeal from the order of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 3rd October 1906.

The judgment of the learned Judge was as follows:—

ROBERTSON, J.—The only question before me is whether the parties, who are Kashmiris, settled in a village in the Gujrat District are, in matters of alienation, governed by the custom of the agriculturists among whom they dwell or not. They are certainly a separate community, differing in race from the Jats of the village, and though they live, so it is found, largely by agriculture, they are also weavers and make and sell cloth. In the *Shajra Nasab* of 1869 of the village it is entered that in 1844, Sambat 1891, certain persons restarted the village, among them were certain Kashmiris who came from the village of Doga.

16th May 1907.

The ancestor of these Kashmiris came into the village when it was rehabilitated in and they have held and cultivated land in the village ever since. The question is, are they as regards alienations bound by the agricultural custom of their neighbours, the Jats? On a full consideration of the case I see no sufficient reason to hold that the power of alienation among the Kashmiris of *mauza* Panjorian is limited in the same way as it is with Jats. There is no instance put forward of an alienation by a Kashmiri ever having been restrained by collaterals. They are perhaps mainly, but they are not exclusively, employed in agriculture. They are a community apart. And between 1886 and 1899 it is shown that there have been no less than 38 uncontested alienations by Kashmiris in this very village. Now I quite agree that one or two instances of uncontested alienations would not be evidence of much value. The neglect to contest might be due to various causes. But when we have a long string of 38 instances in one village within a few years, I think it is quite impossible to hold that it has been established that Kashmiris of that village are governed by the same restrictions on alienation as are operative under the customary law of the neighbouring tribes. I think it lay upon the plaintiff to establish that such a custom obtains among the Kashmiris of *mauza* Panjorian, and I think he has quite failed to do so. No entry regarding Kashmiris has been quoted from the *Bihar-i-an*. I accordingly accept the appeal and dismiss plaintiffs' suit with costs throughout.

Appeal allowed,

No. 18.

Before Mr. Justice Robertson.

APPELLATE SIDE. {

BANTU AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

GANDA SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 690 of 1907.

*Civil Procedure Code, 1882, Section 268—Attachment—Mortgage debt—Moveable or immoveable property.**Held that for the purposes of Section 268 of the Code of Civil Procedure a debt secured by a mortgage lien on land is not immoveable but moveable property.**Miscellaneous appeal from the order of Lala Mul Raj, Additional Divisional Judge, Amritsar Division, dated 10th April 1907.*

Nabi Bakhsh, for appellants.

Dwarka Das, for respondents.

A mortgage-debt was attached and sold in execution of a decree. The Sub-Judge held that as the debt was due on the mortgage of land it was immoveable property, and consequently the proceedings should have been forwarded to the Collector under paragraph XXXIX of Rule V of Chief Court Rules and Orders, Vol. I, page 25, and so set aside proceedings after attachment as being irregular. On appeal by the decree-holder the Divisional Judge reversed the order of the First Court observing in his judgment that the debt was movable property and that the Sub Judge was wrong in holding it to be immoveable property and in considering that the proceedings should have been forwarded after attachment to the Collector.

The judgment-debtor preferred a further appeal.

The judgment of the learned Judge was as follows :—

24th Feby. 1908.

ROBERTSON, J.—The weight of authority is very strong in favour of the view, that for the purposes of Section 268, Civil Procedure Code, a mortgage-debt is not immoveable but moveable property.

The judgment in *Sant Singh v. Jawala Singh* (1) does not touch this point at all.

The judgments are all one way except possibly *Appasami v. Scott* (1). But in the later Madras ruling in which this point was immediately under discussion, *Muniappa Naik v. Subramania Ayyar* (2), the same view is taken as in *Baldev v. Ramchandra* (3), *Debendra Kumar v. Rup Lall* (4), *Kasinath Das v. Sadasiv Patnaik* (5), *Gous Mahomed v. Khawas Ali Khan* (6), and *Baij Nath Lohea v. Binoyendra Nath Palit* (7). Following these authorities, I dismiss the appeal with costs.

Appeal dismissed.

No. 19.

Before Mr. Justice Robertson.

RAMJI MAL AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

MATHRA DAS AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1288 of 1907.

Custom—Pre-emption—Pre-emption on sale of house property—Dinga, Gujrat District.

Found that the custom of pre-emption in respect of sale of house property by reason of vicinage exists in the town of Dinga in the Gujrat District.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Jhelum Division, dated 5th June 1907.

Gula Ram, for appellant.

Nanak Chand, for respondents.

The judgment of the learned Judge was as follows :—

ROBERTSON, J.—It is clear that the parties admitted Dinga 20th Jany. 1908. to be a town.

I can see no reason for interference. The custom of pre-emption is clearly shown to obtain in the town of Dinga *inter alia* by the judgment of this Court No. 19 of 1880, and it is certainly not shown that the *mohalla* in question of 7 houses only is a separate sub-division within the meaning of the Act. The plaintiff is clearly shown to have a right of pre-emption. The appeal 70 (b) is rejected with costs.

Appeal dismissed.

(1) I. L. R., IX Mad., 5.

(2) I. L. R., XVIII Mad., 437.

(3) I. L. R., XIX Bom., 21.

(4) I. L. R., XII Cal., 546.

(5) I. L. R., XX Cal., 805.

(6) I. L. R., XXIII Cal., 450.

(7) 6 Cal. W. N., 5.

No. 20.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

GOHRU AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

APPELLATE SIDE.

Versus

AMIRA,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 662 of 1905.

Joint Hindu family—Suit for recovery of a debt due to—Joinder of a co-parcener as defendant after the period of limitation—Limitation Act, 1877, Section 22.

Held that where in a suit for recovery of a debt due to a joint Hindu family an alleged co-parcener is on the objection of the defendant, added as a co-defendant to the suit after the expiry of the period of limitation, no question of limitation arises and such joinder does not render the suit liable to dismissal by reason of Section 22 of the Limitation Act as against the real defendant.

First appeal from the decree of Khan Muhammad Aslam Hayat Khan, District Judge, Dera Ghazi Khan, dated 30th April 1905.

Shelverton, for appellants.

Shah Nawaz and Bodh Raj Sawhny, for respondent.

The judgment of the Court was delivered by

8th March 1907.

LAL CHAND, J.—The plaintiffs-appellants are members of a joint Hindu family. They have sued Amira, defendant-respondent, for recovery of Rs. 7,461-8-0 on a balance of accounts struck by him on 16th April 1901 and in the alternative for possession of certain lands alleged to have been mortgaged by him on the date that the balance was struck. The suit was filed on 7th April 1904, and at the first hearing on 5th May 1904, a preliminary plea was urged by Amira, defendant, that the claim was time-barred as all the necessary parties were not joined in the suit. On the same date one Udho applied to be joined as a co-plaintiff alleging that he was a co-parcener with the plaintiffs and entitled to a share in the debt sued for. Plaintiffs repudiated being co-parceners with him, whereupon preliminary issues were fixed as to whether Udho was joint with plaintiffs, and if so, whether the suit was barred by limitation. After recording evidence on the preliminary issues the District Judge (M. Sarfaraz Khan) ordered on 11th January 1904 that Udho be made a defendant as a necessary party without finding definitely that he was joint with the plaintiffs. This order was apparently passed under the second clause of Section 32, Civil Procedure Code,

in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

Pleas were then filed by Amira, defendant, on the merits, and Udho reiterated his allegation that he ought to be joined as a co-plaintiff. Udho's prayer was, however, ignored, and after recording evidence for the parties the suit was finally dismissed by the District Judge (M. Aslam Hayat Khan) on the ground that Udho had a share in the amount claimed as a member of the joint Hindu family, that his claim was time-barred, and, therefore, the whole claim must fail as plaintiffs could not sue without joining him as a co-plaintiff.

We are unable to accept the view taken by the District Judge and to maintain his order of dismissal. Even assuming that Udho is a co-parcener with the plaintiffs in the debt sued for as alleged by him and found by the District Judge and that he is a necessary party, it does not follow that the suit instituted by plaintiffs within limitation must fail, because, when Udho was added as a defendant, his claim, if then instituted, would have been barred by time. Section 22 of the Limitation Act applies by its terms to added parties only. There is no provision that in case of a joint claim if the suit of one co-parcener is barred by limitation, the suit by others would be equally barred, though already instituted within time. Nor does the suit necessarily fail, because Udho was not joined as a co-plaintiff when the suit was originally instituted. Udho being a co-parcener is a necessary party, and he was added as a defendant, but there is no law that because he was added as a party at a subsequent stage and not when the suit was originally filed, the suit ought to be dismissed on that account. *Rattan Chand v. Ram Parshad* ⁽¹⁾ is clearly distinguishable on the ground that the co-parcener, who was a necessary party, was not impleaded at all, and the plaintiff insisted throughout that he should be excluded from the record. The question in issue was merely conceded and not discussed in *Motan Mal v. Kirpa Mal* ⁽²⁾, but the view we take is amply supported by the following remarks at page 198 in Full Bench judgment in *Labhu Ram v. Kanshi Ram* ⁽³⁾ :—

“ We hold that one co-promissee may sue on his own account
“ and that Section 45 of the Contract Act does not prohibit this
“ and that one plaintiff must not be held to have lost his right to

(¹) 69 P. R., 1906.

(²) 79 P. R., 1906.

(³) 57 P. R., 1905, F. B.

“enforce an obligation, because others entitled to share in the
“right have lost their remedy only by the expiry of the
“period of limitation and have been joined as defendants.

“In this case, therefore, we hold that the plaintiff was
“entitled to prosecute the suit for his own benefit, and that the
“joinders of his sons, members of a joint Hindu family, as
“defendants after the period of limitation had expired, does not
“render his suit liable to dismissal as against the original
“defendants on the ground that the period of limitation has
“expired as against such persons subsequently joined, or on the
“ground that had such persons sued as plaintiffs, their suit
“would have been barred by time.” In *Kale Khan versus Sewa Ram, Plowden, J.*, remarked: “The co-promisee or co-promisees
“may recover, and the suit of the rest be dismissed speaking
“of the case where co-promisees have joined as plaintiffs after
“the period of limitation had expired. Here the case is much
“stronger. They have here joined as defendants only, and we
“consider that the question referred must be answered in the
“negative.” The counsel for respondent attempted to distinguish the present case on the ground that in *Labhu Ram v. Kanshi Ram* ⁽¹⁾ the suit was found to have been instituted by a managing member of the family. But the position so taken is altogether untenable as the question referred for decision by a Full Bench was a general issue as stated at pages 194 and 195 of the report regardless of the fact whether the suit is or is not instituted by the managing member of a joint Hindu family.

We have, therefore, no hesitation in holding that the order dismissing the suit is not maintainable. The District Judge has further briefly expressed his opinion on the remaining issues without discussing the merits in any detail. We are unable to accept this summary expression of opinion as finding in the case. Nor are there adequate materials on the record to support the opinion or to assist in arriving at independent conclusions. The suit is on a balance of accounts, and defendant pleaded that he had struck the balance without any adjustment of accounts. There is no copy of the accounts on the file though by order, dated 29th June 1904, plaintiffs were ordered to file a copy. The omission was possibly due to some misapprehension as the order in Vernacular does not correspond in terms with the order recorded in English by the District

⁽¹⁾ 57 P. R., 1905, F. B.

Judge in his own hand. But obviously the case cannot, under the circumstances, be decided satisfactorily without scrutinizing the accounts which is not possible in the absence of proper materials on the record. The District Judge has really disposed of the suit on a preliminary point of limitation which for the reasons already given we are unable to uphold.

We, therefore, accept the appeal, set aside the decree of the District Judge, and remand the case to the Lower Court for a determination on the merits. Court fee on appeal will be refunded and other costs will be costs in the cause.

Appeal allowed.

No. 21.

Before Mr. Justice Kensington and Mr. Justice Rattigan.

DAYAL SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

UTTAM KAUR AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 216 of 1907.

Jurisdiction of Civil Court—Suit against Ruling Chief with respect to property owned by him and situate in British India—Suit instituted without obtaining previous consent of Governor-General in Council—Maintainability of suit as against the co-defendants—Civil Procedure Code, 1882, Section 433.

Held that the Raja of Poopch is a Ruling Chief within the meaning of Section 433, Civil Procedure Code, and as such cannot be sued in Courts of British India in respect of immoveable property acquired by him in that country without the previous consent of the Governor-General in Council.

Held, also, that a suit instituted by the reversionary heirs of a childless proprietor against a number of alienees holding separate and distinct portions of his estate under independent titles in which a Ruling Chief is but one of several defendants should not be dismissed against all the defendants, merely because it fails against the Ruling Chief on the ground that previous consent of Government as required by Section 433 had not been obtained before the commencement of the suit, a defence peculiar to that defendant alone.

First appeal from the decree of B. H. Bird, Esquire, District Judge, Amritsar, dated 28th November 1906.

Grey, for appellant.

Beechey, Kanhaya Lal, Raguath Sahai, and Sheo Narain, for respondents.

16th May 1908.

The judgment of the Court was delivered by

RATTIGAN, J.—The allegations in the plaint are to the following effect :—One Sardar Dhanna Singh owned a large and valuable property in Amritsar ; upon his death, which occurred very many years ago, this property passed to his three widows, Mussammat Rajind Kaur, Gujri, and Pardhan Kaur. The two latter apparently died some time ago, but Mussammat Rajind Kaur survived her husband for very many years and died at an advanced age on the 27th April 1894. Plaintiff No. 1 (Dayal Singh) is the nephew of the deceased Sardar Dhanna Singh, and the other plaintiffs are persons to whom he has sold a part of his share in the inheritance.

The widows of Sardar Dhanna Singh, it is alleged, sold or mortgaged various portions of the said property at different times, and the various defendants are either vendees or mortgagees in possession of such respective portions of the property by virtue of such alienations. It is contended on behalf of plaintiffs that these various alienations were effected for no necessary purposes and are, therefore, not binding upon them. They, therefore, sue for possession of the whole property and assert that their cause of action arose on the 27th April 1894, when the last surviving widow (Mussammat Rajind Kaur) died. The suit was instituted on the 26th April 1906. The defendants raised various pleas in defence, but with these it is unnecessary for us to deal at present, as the suit has been dismissed on a preliminary ground. One of the defendants is the Raja of Poonch, and on his behalf the objection was raised that he was a Ruling Chief within the meaning and for the purposes of Section 433, Civil Procedure Code, and that the claim must fail as against him, inasmuch as the sanction required by the provisions of that section had not been obtained prior to the institution of the suit. Admittedly such sanction was not obtained, and it was conceded by Mr. Grey before us that if the sanction was really requisite, it must be obtained prior to the institution of the suit (*Chandu Lal v. Awad-bin-Umar* ⁽¹⁾). It was at first not denied by the plaintiffs that the Raja of Poonch was a Ruling Chief, but subsequently they (or their advisers) resiled from this position, and asserted that he was not such. The District Judge thereupon communicated with the Resident in Kashmir, and upon receipt of a letter from his office in reply, held that the Raja of Poonch was a Ruling Chief, and dismissed the suit as against him by order, dated the 15th October 1906. By a subsequent order, dated 28th November 1906, the learned Judge

(¹) *I. L. R.*, XXI Bom., 351.

held that as plaintiffs had alleged and sued on one cause of action, and as the suit against one of the defendants (the Raja) was bad, the claim must necessarily fail as against all the defendants. Upon this view of the case he dismissed plaintiffs' suit *in toto*. They have appealed to this Court, and the Raja of Poonch has filed cross-objections under Section 561, Civil Procedure Code, with regard to the amount awarded to him as costs by the District Judge. We have heard lengthy arguments from counsel on both sides. For the appellants Mr. Grey contended (1) that there was no sufficient evidence on the record to support the finding that the Raja of Poonch was a Ruling Chief; (2) that even if it was held that the Raja was such, he was being sued in this case not as a Ruling Chief but merely as an ordinary individual who, in his private capacity, happened to be in possession of part of the property in dispute, and that, consequently, no sanction was required for the institution of the case as against him; (3) that if the first and second contentions failed, still the proper and equitable course to adopt would be to allow plaintiffs to withdraw their claim against the Raja with liberty, if they were so advised, to bring a fresh suit against him (Section 373, Civil Procedure Code); and (4) that in no event could it be held that the present suit, even if bad as against the Raja, must, therefore, fail against the other defendants who stood in an entirely different position, and could not shelter themselves behind the technical plea which was open to the Raja.

These contentions were stoutly contested by the learned counsel who respectively appeared for the Raja and the other defendants. Mr. Beechey for the Raja argued that his client was a Ruling Chief, and that the letter sent from the office of the Resident in Kashmir was sufficient, if not indeed conclusive, proof of this fact (the *Sultan of Johori's case* (1), *Foster's case* (2), (pp. 811—813); that once it is established that the defendant is a Ruling Chief, he cannot be sued in the Courts of this country save after sanction duly and rightly given by the Government; that a Ruling Chief, if sued in respect of immoveable property owned by him in British India, must *in every case* be regarded as a Ruling Chief and not as a private owner of such property; and that it is not open to the Courts to hold in such cases, that the said property belongs to an individual, for a Sovereign Prince or a Ruling Chief cannot divest himself of the attributes appertaining to his position as such.

(1) *L. R.*, 1. Q. B. (1894), 149.(2) *L. R.*, 1. Ch. (1900), 811.

For the other defendants reference was made to Section 11, Civil Procedure Code, and it was argued that as there was but one cause of action (*i.e.*, the death of the last surviving widow), the suit as a whole must fail against all the defendants if it once be held to be bad as against one of the latter. It was urged that this objection went to the root of the Court's jurisdiction to hear and decide such a suit, and that as the Court had no jurisdiction to entertain it, once it found that the claim could not be considered as against the Raja of Poonch, the only course open to the Court was to dismiss the suit in its entirety.

Before we proceed to deal with these questions, we must refer to another matter. It seems that Mussammat Uttam Kaur, one of the defendants, was, on the application of plaintiffs, appointed under Section 30, Civil Procedure Code, a representative respondent. She has not appeared at the hearing before us, and the summons issued to her for this hearing has not been returned after service. It is difficult to understand why this lady was selected as a representative respondent. She has taken no interest whatever in the suit in the Lower Court. She put in no appearance and filed no written statement in answer to the plaint, nor is her case in any way different from that of the defendants other than the Raja of Poonch. Under these circumstances, and as all the learned counsel who appeared before us were agreed that her presence was not necessary and asked that the hearing of the appeal should not be further delayed on her account, we decided to proceed with the hearing.

To turn now to the questions at issue before us.

The first point for decision is, whether the Raja of Poonch is a Ruling Chief within the meaning of Section 433, Civil Procedure Code. Mr. Beechey on behalf of the Raja has, from the very outset of the case, contended that his client is a Ruling Chief, and it is noticeable that at first the plaintiffs conceded this point. In their reply to Mr. Beechey's pleas they stated, "we admit that consent is necessary, and we will apply for it." In replication it was argued that sanction should have been obtained before the institution of the suit, and that a suit instituted without such sanction was bad and could not be validated by a sanction obtained after its institution, *Chandu Lal v. Awad-bin-Umar* (1). At a subsequent hearing of the case

the plaintiffs resiled from their original position and contended that the Raja was not a Ruling Chief within the meaning of Section 433, Civil Procedure Code. The Raja's learned counsel took exception to this *valte face*, but the District Judge decided to refer the matter to the Resident in Kashmir. He accordingly addressed the Resident on the subject and received a letter in reply to the effect (as stated in the order of the learned Judge, dated 15th October 1906) that the Raja was a Ruling Chief for the purposes of Section 433, Civil Procedure Code. For some unexplained reason this letter from the Resident's office cannot be traced; it is not upon the file of the case sent up to this Court, and it is impossible to say what has become of it. With a view to clearing up this point, we decided to address the Government of India, and in reply to the letter sent by the Registrar of this Court to the Foreign Office, an answer has been sent to the effect that "on two previous occasions in 1899 and 1902, the Government of India have issued certificates under Section 433 of the Civil Procedure Code permitting the institution of civil suits in the Court of the District Judge, Rawalpindi, against Raja Baldeo Singh of Poonch."

In our opinion the Raja must, upon the materials before us, be held to be a Ruling Chief for the purposes of Section 433 of the Code. He is undoubtedly the head of a Native State, and there is no evidence that he is not, as such, a Ruling Chief. On the other hand, from the fact that the Government of India have on two previous occasions granted certificates under Section 433, in respect of civil suits brought against him, the inference is strong that he is regarded by Government as a Chief to whom the provisions of that section are applicable. This fact may not be conclusive upon the point as against Government, but in the absence of all evidence to the contrary, it is, we think, sufficient for the purposes of this case to establish the Raja's contention. We, accordingly, hold that the Raja is a Ruling Chief, so far as this case is concerned.

The next point is, whether even if the Raja be such Ruling Chief, a certificate under Section 433 was necessary. Mr. Grey argues that it was not, inasmuch as the Raja holds the property in dispute merely in a private capacity and not as the head of the Poonch State. We are unable to accept this contention. In the first place there is no proof that this property is held by the Raja in a private capacity, and the presumption would be that it is held by him in his public capacity. But

even if it be assumed that he holds it as a private individual, he is still the head of his State, and as such he cannot divest himself of his *status*, except by appearing and submitting to the jurisdiction of the Courts. This he has certainly not done in this case. On the contrary he has, through his counsel, asserted his rights as a Ruling Chief from the very first. In support of his argument, Mr. Grey referred to certain vague remarks of the Calcutta High Court in the case of *Maharajah Bir Chandar v. Ishar Chandar* (1), at page 420. But the point now under consideration was not before the learned Judges, and upon it they gave no decision. On the other hand, the case of *Maharajah Radha Kishen v. Gobind Chandra* (2), is directly in point, and is admittedly against Mr. Grey's contention. We have ourselves no hesitation in agreeing with the judgment in the latter case. There is no warrant, so far as the terms of Section 433 are concerned, for limiting the operation of that section to those suits in which the Ruling Chief is sued in his public, as distinct from his private, capacity. The phraseology employed is general: "Any such Prince or Chief" may, with the consent of the Governor-General in Council, "certified by the signature of one of the Secretaries to the Government of India (but not otherwise), be sued", etc. We read this to mean that in any case when a Ruling Chief is sued, the prescribed consent is a condition precedent to the institution of the suit. In the present case, even upon the assumption that the Raja of Poonch holds the property in dispute as a private individual, he must still be sued as the Raja of Poonch, and the reasons of public policy which require that a Ruling Chief cannot, as such, be sued without the consent of the Governor-General in Council, are, we think, as applicable to a case where he is sued in respect of private property owned by him in British India as to the case where the suit is against him as the head of his State. And in this connection we would point out that in every such case, the suit against him must be in the name of his State unless Government permits the suit to be brought against him in the name of an agent or in any other name (Section 434, Civil Procedure Code).

We accordingly hold that the present suit, which was admittedly instituted without the previous consent, required by Section 433 of the Code, must fail as against the Raja of Poonch.

(1) 3 Cal. L. R., 417.

(2) 2 C. L. J. R., 163.

Mr. Grey prayed that if in our opinion the suit must fail against the Raja on this ground, the plaintiff might be allowed to withdraw his claim against that defendant with liberty to bring a fresh suit if so advised, under Section 373, Civil Procedure Code. The provisions of this section are as applicable to appeals as to proceedings in the original Court (*Subbaramien v. Ponnusawmy* (1), *Ganga Ram v. Data Ram* (2), *Khatcon Koonwar v. Hurdoot Narain*, (3) and *Genda Mal v. Pirbhu Lal* (4)), and we are of opinion that this a fit and proper case to exercise the powers conferred upon us by that section read with Section 582, inasmuch as there was some doubt whether the Raja was a Ruling Chief within the meaning of Section 433.

But we must, at the same time, direct that the plaintiffs shall pay the Raja's costs as hereinafter estimated up to date.

The last question before us needs but brief discussion. The District Judge holds that because there is only one cause of action in the case, plaintiffs' suit, which fails against the Raja, must necessarily fail as against all the defendants. We cannot accept this view. Assuming that there is but one cause of action, we cannot agree that the suit, if found to be bad as against one defendant, must *ipso facto* be held to be bad as against all the other defendants quite irrespectively of the grounds upon which the suit is held bad as against the first defendant. There may be only one cause of action, but the defences raised by the various defendants may be (and in this case are) entirely different, and it does not follow, because one defendant succeeds in escaping liability by reason of a defence peculiar to himself, that the claim as a whole falls to the ground. For example, if A sues B, C and D, on a contract, and B pleads that he was a minor at the time when the contract was made, the claim against B will fail if the plea of minority is established. But it would be absurd to hold that the claim must, therefore, fail as against C and D also. It is said that in the present case the point involved is one of jurisdiction; that the Court had no power to entertain a suit in which one of the defendants was a Ruling Chief; and that consequently the suit, as a whole, must be dismissed once it is found that one of the defendants is such Ruling Chief, the suit being one and indivisible. For this contention we can find no warrant in the provisions of Section 433 of the Code which clearly confer a personal privilege on the persons therein specified. No such person can be sued save in accordance with those provisions, but it is nowhere enacted

(1) 5 M. H. C. R., 298.

(2) I. L. R., VIII All., 82.

(3) 20 W. R., 163.

(4) I. L. R., XVII All., 37,

that a suit in which other persons are co-defendants with a privileged person must fail *in toto*, because the latter person can establish a technical defence to the suit. We were referred to Section 11 of the Code, but we fail to see how that section helps the other defendants. A suit in which a Ruling Chief is but one of several defendants is not a suit of which a Civil Court's cognizance is barred by any enactment. The Ruling Chief may not be subject to the jurisdiction of the Court, but it is going much too far to argue from this that the Court cannot take cognizance of the claim in so far as it affects persons who cannot plead that they are Ruling Chiefs.

To illustrate the absurdity of holding otherwise, we may give the following example. A sues B and C in a Civil Court for possession of land. B is a trespasser, but C is a tenant of A. The Civil Court holds that the claim against C is not cognizable by it, and must be determined by a Revenue Court. Is it, therefore, bound to dismiss the claim against B? If so, from what Court can A claim relief against B? The Revenue Courts would have no jurisdiction so far as the claim against B was concerned, and yet upon the argument addressed to us, the Civil Court, once it found that it had no jurisdiction to entertain the claim as against C, must forthwith dismiss the whole suit. In this connection we may refer to the rulings of this Court reported as *Mussammatt Karmon v. Jivan Mal* ⁽¹⁾, and *Ghulam Nabi v. Bisharat Ali* ⁽²⁾.

We, therefore, hold that the plaintiffs' suit as against the defendants, other than the Raja of Poonch, was wrongly dismissed by the District Judge on the ground given in his judgment, dated the 28th November 1906.

The conclusions at which we arrive upon the view we take of the case are as follows:—

- (1) that plaintiffs' appeal must be accepted as against the Raja of Poonch to this extent that they be allowed to withdraw their claim against him with liberty to bring a fresh suit if so advised; plaintiffs to pay the Raja's costs up to date;
- (2) with reference to the Raja of Poonch's cross-objections that the amount of Rs. 50 allowed to the Raja as costs by the District Judge, is sufficient, and that the like amount be allowed to him as costs in this Court. The claim against the Raja

⁽¹⁾ 19 P. R., 1892.

⁽²⁾ 25 P. R., 1900.

has been dismissed by the District Judge on a technical objection and without reference to the merits of the case, and we see no good reason for enhancing the amount;

- (3) that plaintiffs' appeal as against the defendants other than the Raja of Poonch, must be allowed, and the case remanded under Section 562, Civil Procedure Code, to the District Judge for determination in accordance with law. The court-fee on the appeal to be refunded, and the other costs to be costs in the cause.

Appeal allowed.

No. 22.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

MEHNGA,—(PLAINTIFF),—APPELLANT,

Versus

ASO,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 860 of 1906.

Custom—Inheritance—Succession of illegitimate son in presence of daughter lawfully born—Saidhu Jats of Nakodar tahsil, Jullundur District.

Found that by custom among Saidhu Jats of the Nakodar tahsil, Jullundur District, an illegitimate son is not entitled to succeed to his mother's property in the presence of a daughter lawfully born of that mother.

Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated 23rd April 1906.

Shelverton, for appellant.

Daulat Ram, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—This is rather a curious case. The property 30th May 1907.
in dispute originally belonged to one Kesar Singh, a Saidhu Jat of the Nakodar tahsil, Jullundur District. After Kesar Singh's death, it passed to his daughter, Mussammat Bholi, who was married to one Chanda Singh. It is found by the District Judge on incontrovertible grounds that the present defendant, Mussammat Aso, is the legitimate daughter of Chanda Singh and Mussammat Bholi. This finding was not contested by plaintiff in the Lower Appellate Court, and though some attempt was

made in this Court in a half-hearted manner to throw doubts upon the finding, we have no hesitation in accepting it and in holding that Mussammât Aso is the legitimate daughter of Chanda Singh and Mussammât Bholi.

After the death of Chanda Singh, which apparently occurred some 16 or 17 years before the institution of the present suit, Mussammât Bholi contracted an unlawful intimacy with one Jhanda, a Muhammadan *mirasi* and cohabited with him practically to the day of her death. It was contended in the Lower Courts that an actual marriage took place between the two and that Mussammât Bholi was converted to Muhammadanism. These contentions were found by the District Judge, after full enquiry, to be unproved, and with this finding the Divisional Judge on appeal expressed his entire concurrence. Under these circumstances the learned counsel for appellants very fairly admitted that as the evidence in support of plaintiff's contentions was at best hardly satisfactory, he could not contest the correctness of the conclusions concurrently arrived at upon these two points by the Courts below.

The learned counsel, however, argued that even if the plaintiff was the illegitimate son of Mussammât Bholi, he was entitled to a share in his mother's property, and in support of this argument reliance was placed upon paragraph 547 of Mayne's Hindu Law (7th edition) and the decision of their Lordships of the Privy Council in the case of *Myna Bayee v. Ootaram* (1).

These authorities deal with the case of the illegitimate son of a person of the *Sudra* tribe or caste and discuss the question of inheritance from the point of view of strict Hindu Law. But the parties in this case are ordinary agricultural Jats of the Saidhu *gôt* of Jullundur and we have no hesitation in holding that among such persons questions of succession to property, especially to property which (as here) consists of agricultural land, cannot be determined by the principles of the *Mitakshara*.

We are not prepared to say that such Jats are in any case members of the *Sudra* caste, and it is apparently a question of some difficulty to define the persons who belong to that caste. But quite apart from this difficulty, it would, we think, be a startling proposition to hold that a Punjab agricultural tribe such as the Saidhu Jats of Jullundur are governed in matters of inheritance (and even in such peculiar matters of

inheritance as are here involved) by the principles adopted by Sudras of the Madras Presidency.

Speaking for ourselves, we may say that we are not satisfied on the evidence that the plaintiff is the son of Mussamat Bholi. At the time when he was born Jhanda (his putative father) was, no doubt, cohabiting with Mussamat Bholi, but it must be remembered that at the same time Jhanda had a wife living, and the ordinary presumption of law would be that plaintiff was (in the absence of evidence to the contrary) the son of Jhanda by his lawful wife. There is absolutely no evidence to prove that Mussamat Bholi was the mother, and though the District Judge does in fact arrive at the conclusion that she was the mother, he admittedly came to that conclusion with the utmost hesitation. He regarded the point as one of no great importance, and no stress was laid upon it in his Court. Under these circumstances he remarks: "On the whole I am inclined to believe, seeing that Sudarni Bholi had already had illegitimate children, that plaintiff was her child," but as he observes at the same time, I "confess it is extremely difficult to decide who his mother was."

The learned Divisional Judge also does not lay stress upon this aspect of the case and merely incidentally states that in his opinion plaintiff was the result of the cohabitation of Mussamat Bholi and Jhanda. We doubt whether the Courts below would have expressed themselves in these terms if the point now urged before us had been put forward before them in support of plaintiff's case. There is really no evidence whatever to support the allegation, and the utmost that can be said in its favour is that Mussamat Aso, at the time of mutation, asserted before the Naib Tahsildar that plaintiff was not the legitimate, but the illegitimate son of Mussamat Bholi. But Mussamat Aso, a respectable married woman, would have no personal knowledge of the maternity of plaintiff, for though Mussamat Bholi was her mother, it is in the highest degree improbable that she associated, or had anything to do, with her mother after the latter utterly disgraced herself by cohabiting with a Musalman *Mirasi*. She would, of course, know that plaintiff could not be a *legitimate* son of Mussamat Bholi, for the question whether or not Mussamat Bholi had been lawfully married to Jhanda would be a matter of notoriety in the village. But Mussamat Aso could only *surmise* that plaintiff was her son by Jhanda and we do not think that this surmise is sufficient to rebut the ordinary presumption of law

that plaintiff is the lawful son of Jhanda by the latter's lawful wife, who, for ought we know to the contrary, was at the time cohabiting with her husband. Moreover it is to be remembered that Mussammat Aso when making the statement in question was mainly, if not entirely, concerned with denying the rights of plaintiff as a legitimate son of Mussammat Bholi. This was in fact the only question then at issue. Assuming, however, for the sake of argument that plaintiff is the son of Mussammat Bholi, we still find it impossible to hold that he is entitled to claim a share of the property as against Mussammat Bholi's legitimate daughter. No attempt was made in the Lower Courts to prove so exceptional customary right in fact, it is practically for the first time urged in this Court on further appeal that any such right exists. The ordinary rule would certainly seem to be the other way, and we see no reason to doubt that the rule propounded by this Court in *Hakim v. Jagat Singh* ⁽¹⁾, No. 87 P. R., 1898, is not equally applicable to Sadhu (Hindu) Jats of Jullundur, though the parties in that case were Varaich (Hindu) Jats of the Gujranwala District. In the case cited the learned Judges observe: "Recent decisions of this Court, notably *Lachu v. Dal Singh* ⁽²⁾, and "*Chanda Singh v. Mela* ⁽³⁾, have gone some distance in the "direction of supporting custom proved to exist whereby the "children of connections not commenced by formal marriage "ceremonies have been held entitled to succeed to their father's "estate. In these cases, however, it has rather been the view "that cohabitation and the treatment of the woman by the man "in all respects as a lawful wife, and the treatment of the "children by their father in all respects as his lawful children, "takes the place of the marriage ceremony, and does in fact "by custom constitute a marriage, and that such a view tends "rather to morality than immorality on the whole, which has "led to the upholding of the rights of the children to succeed. "It is, however, a great step further to hold that a connection "by cohabitation between a man and a woman between "whom marriage is, to their own knowledge throughout, distinctly unlawful is to give a full right of succession to illegitimate children. We are not to set up an abstract code of "morals to be followed by agricultural Sikhs, but we are distinctly to recognize as such, and to refuse to accept as proved, "any custom which is obviously and clearly immoral, and when "it is sought to prove the existence of a custom regarding "inheritance which is at least of very doubtful morality, it is "necessary to scrutinize the proof of its existence very carefully

⁽¹⁾ 87 P. R., 1898.⁽²⁾ 33 P. R., 189.⁽³⁾ 73 P. R. 1897.

"and it must not be found to be binding if contrary to justice,
"equity and good conscience."

These observations, with which we express our entire concurrence are very pertinent to the present case. Mussammat Bholi was a Hindu Jat, Jhanda was a low caste Musalman, and it is not now contended (and in face of the evidence and of the concurrent findings of the Courts below, it could not successfully be contended) that any marriage took place between the two. There is also no evidence of any custom relating to the tribe to which Mussammat Bholi belonged which recognizes the right of an illegitimate son to succeed to his mother's property in the presence of a daughter lawfully born of that mother. No such plea was advanced in the Lower Courts nor was any attempt made to prove such a custom, and we cannot under the circumstances accede to Mr. Shelverton's request that the case should be remanded for further enquiry upon this point. It is not necessary for us to decide, and we therefore refrain from expressing any opinion, whether if such a custom were actually established, it would or would not be entitled to receive recognition in a Court of Justice. For the reasons given we agree with the Courts below that plaintiff's suit must be dismissed and we accordingly reject this appeal with costs.

Appeal rejected.

No. 23.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

KISHAN CHAND,—(DEFENDANT),—APPELLANT,

Versus

TAJ-UD-DIN AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1238 of 1907.

Valuation of suit—Suit for redemption—Value for purposes of further appeal—Punjab Courts Act, 1884, Section 40 (b).

Held that for purposes of Section 40 (b) of the Punjab Courts Act, 1884, the value of a suit for redemption is the sum found by the First Court to be payable on redemption, and the fact that the Lower Appellate

Court on appeal had reduced that sum does not alter the value of the property involved in the decree.

Held further that the amount found due to the mortgagee for repairs is included in the jurisdictional value of the appeal.

Further appeal from the decree of S. W. Gracey, Esquire, Divisional Judge, Amritsar Division, dated 27th August 1907.

Sham Lal and Kanhaya Lal, for appellant.

Muhammad Shafi, for respondent.

The judgment of the Court so far as is material for the purposes of this report was delivered by

8th Novr. 1908.

REID, J.—Counsel for respondents objected that the value of the suit was less than Rs. 1,000 and that the decree of the Lower Appellate Court did not involve directly some claim to, or question respecting, property of like value, and that a further appeal consequently did not lie.

He cited *Ghulam Ghaus v. Nabi Bakhsh* ⁽¹⁾, pages 76—77, *Muhammad Khan v. Ashak Muhammad Khan* ⁽²⁾, *Bhag Mal v. Mohra* ⁽³⁾, Civil Revision 221 of 1903, unreported, *Tamorin v. Calicut v. Narayana* ⁽⁴⁾, and *Vasudeva v. Madhava* ⁽⁵⁾.

The suit was for redemption on payment of Rs. 323. The Court of First Instance found Rs. 1,168 due by the mortgagor and made redemption conditional on payment of that sum.

The Lower Appellate Court deducted Rs. 564, consisting mainly of money due under a bond, subsequent to the mortgage, and interest on that bond. Both Courts included in the amount due Rs. 280-12-9 cost of repairs of the mortgaged premises, and excluded Rs. 425 claimed as interest thereon.

Ghulam Ghaus v. Nabi Bakhsh ⁽¹⁾ is against the objector. It was held that the words "claim to or question respecting" in Section 40 (1) (a) (i) of the Courts Act are very comprehensive and not to be lightly construed against the right of appeal, and that the decree under appeal, and not the amount by which the appellant wishes the pre-emption price to be increased or reduced, has to be considered. We are unable to give effect to the contention that, because the Lower Appellate Court reduced the sum payable on redemption

⁽¹⁾ 24 P. R., 1903, F. B.

⁽²⁾ 169 P. R., 1888.

⁽³⁾ 106 P. R., 1895, F. B.

⁽⁴⁾ I. L. R., V Mad., 284, F. B.

⁽⁵⁾ I. L. R., XVI Mad., 326.

to Rs. 604, that is the value of the property involved in the decree. The fact that the decree of the Lower Appellate Court superseded the decree of the Court of First Instance, which the appellant sought to restore, does not alter the fact that a sum exceeding Rs. 1,000 was decreed by the Court of First Instance as payable on redemption and is involved in the appellate decree.

Muhammad Khan v. Ashak Muhammad Khan (1) does not help the appellant, as the section construed therein was Section 39, which differs materially in its language from Section 40 (1) (a).

In *Bhag Mal v. Mohra* (2) both Courts below had found that the mortgage-money due was Rs. 300, the sum specified in the plaint, and it was held that the defendant's plea, that Rs. 3,000 were due, did not give him a further appeal. The ruling obviously does not help the objector.

In the Madras case *Turner, C. J., and Muttusami Ayyar, J.*, differed from three other Judges composing the Full Bench, who held that the value of improvements was not to be calculated in ascertaining the value of the subject-matter of the suit under Section 12 of the Madras Courts Act, and no attempt has been made to show that the language of that section was similar to the language of the section now under discussion. The case of *Vasudeva v. Madhava* does not help the objector, the decree of the Court of First Instance having confirmed the allegation in the plaint that a sum within the appellate jurisdiction of the Lower Appellate Court was due on redemption.

Civil Revision No. 221 of 1903 does not help the objector. It was held therein that there was nothing to show that the value of the land, of which redemption was sought, exceeded the amount payable on redemption, the case not being one to which the artificial valuation of 30 years' Government revenue was applicable.

We have no hesitation in overruling that part of the objection which is based on the contention that the amount decreed for repairs cannot be included in the jurisdictional value of the appeal. That amount is as much part of the money payable before redemption as is the actual mortgage

(1) 106 P. R., 1695.

(2) 169 P. R., 1888.

consideration due and is therefore involved in the decree. *Bhag v. Ghisita Mal* ⁽¹⁾ is directly in point. *Muhammad Afzal Khan v. Nand Lal* ⁽²⁾, *Abdur Rahman v. Charag Din* ⁽³⁾, and *Balwant Singh v. Ram Das* ⁽⁴⁾ are against the objector.

The objection is overruled.

On the merits we find no force in the appeal.

Note.—The rest of the judgment is not material for the purposes of this report.—Ed., P. R.

No. 24.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

REVISION SIDE.

{ KHAGINDRA NATH DAS,—(DEFENDANT),—PETITIONER,

Versus

{ NANAK CHAND,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 42 of 1908.

Hindu Law—Joint family property—Liability of, for debts incurred by father for liquor.

Held that the property of a joint family governed by the Daya Bhag School is not liable in the hands of a son for debts incurred by his deceased father for liquor supplied to the latter who died before suit.

Petition for revision of the order of Lala Mul Raj, Judge, Small Cause Court, Lahore, dated 22nd July 1907.

Mukerji, for petitioner.

Obedulla, for respondent.

The judgment of the Division Bench was delivered by

6th Novr. 1908.

REID, J.—The question for consideration is whether the joint family property is liable in the hands of the son for the debt contracted by his deceased father for liquor supplied to the latter. The pleader for the respondent contended that Section 73 of the Contract Act superseded the Hindu Law on the point, but was unable to cite any authority, and we have no hesitation in overruling the contention. The parties are bound by the personal law of the debtor, who was governed by the Daya

⁽¹⁾ 55 P. R., 1890.

⁽²⁾ 16 P. R., 1908, F. B.

⁽³⁾ 19 P. R., 1908, F. B.

⁽⁴⁾ 28 P. R., 1908.

Bhag school of Hindu Law. The rules of that school relevant to the case, do not appear to differ from the Mitakshara, which are set out in Section 303 of Mayne's Hindu Law, Edition 7; Part V, Chapter IX of Bhattacharyi's Hindu Law, Edition 2; pages 449 to 452 of Ghose's Hindu Law, Edition 2, and ample authority from which Junuta Vahana and Jagannatha apparently did not dissent, is cited by these commentators for holding that the property in the hands of the appellant is not liable for debts contracted for liquor supplied to his father. His personal liability is equally regulated by these authorities. Had the suit been instituted before the father's death, the respondent might have been in a stronger position, but it is unnecessary to discuss this aspect of the case, the suit having been instituted after the father's death.

The application under Section 25 of the Small Cause Courts Act is allowed and the suit is dismissed with costs.

Application allowed.

No. 25.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

RAM JAS,—PLAINTIFF,

Versus

RALLA,—DEFENDANT.

} REFERENCE SIDE.

Civil Reference No. 9 of 1908.

Punjab Tenancy Act, 1887, Section 100 (2)—Validation of proceedings where there had been a mistake as to jurisdiction—Registration of decree of Civil Court in Revenue Court.

Where a suit cognizable by a Revenue Court only had been instituted in and decided by a Civil Court, the presiding officer of which was invested with revenue powers which did not give him jurisdiction to try the suit, held that, as a matter of principle, the decree should not be registered as the decree of a Revenue Court.

Case referred by Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, on 16th January 1908.

The point involved was referred to a Division Bench by the following order of the learned Judge in Chambers :—

CHEVIS, J.—The plaint recites that defendants have been holding possession as tenants and paying a yearly rent. Plaintiff when examined by the Tabsildar only varied the story so far that he said he had been in receipt of share of produce.

5th June 1908.

The learned Divisional Judge is quite right in holding the case to be one falling under Section 77 (3) (a), Tenancy Act. (Suit by a landlord to eject a tenant). It is triable by an Assistant Collector, 1st grade. But it has been tried as a civil suit by a Tahsildar Munsif who on the revenue side has only the powers of an Assistant Collector, 2nd grade. The question is whether under these circumstances this Court should order the decree to be registered as that of an Assistant Collector, 1st grade, or should direct the Divisional Judge to set aside the proceedings of the First Court as void for want of jurisdiction, and to return the plaint for presentation to a Revenue Court of competent jurisdiction. The practice of this Court has not always been uniform. As Divisional Judge I have often referred such cases, and I have sometimes found one course has been adopted by this Court and sometimes the other. I am personally in favour of following the latter of the above two courses, as to register the decree as one of an Assistant Collector, 1st grade, is practically to sanction the trying by a Tahsildar of a case which is beyond his powers—a somewhat similar difficulty arises when such a case has been decided by a Munsif who has no revenue powers at all. The difficulty does not arise when the case has been tried by an extra Assistant Munsif who has the powers of an Assistant Collector, 1st grade; there the only flaw is that the officer has exercised his civil powers instead of his revenue powers.

As it appears desirable to settle definitely what course should be followed in such cases, I refer this case to a Division Bench.

The judgment of the Division Bench was delivered by

10th Novr. 1908.

REID, J.—Section 100 (2) of the Tenancy Act vests in this Court the discretion to order registration, in a Court which has jurisdiction, of the decree of a Court which had not jurisdiction, if the suit was determined by that Court in good faith and the parties have not been prejudiced by the mistake as to jurisdiction, but, as a matter of principle, the decree of the Court which had not jurisdiction should not, in our opinion, be so registered if the suit was cognisable only by a Court of jurisdiction higher than that of the Court which passed the decree, where the presiding officer of the latter Court is invested with both Civil and Revenue powers. In the case before us the Court which, as a Civil Court, tried a suit cognisable only by a Revenue Court, had

powers of an Assistant Collector of the 2nd grade and the suit is not cognisable by it, being cognisable by an Assistant Collector of the 1st grade only.

We set aside the decree and order that the plaint be registered in the Court of an Assistant Collector of the 1st grade with territorial jurisdiction.

Costs incurred will be costs in the cause.

— — —
No. 26.

Before Mr. Justice Kensington and Mr. Justice Shah Din.

ABDUL KHAN AND OTHERS,—(PLAINTIFFS),—

APPELLANTS,

Versus

HAJI SHAH AND OTHERS,—(DEFENDANTS),—

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1449 of 1907.

Jirga—Resolution of—No restriction on jurisdiction of Civil Courts where the provisions of Section 10 of the Punjab Frontier Crimes Regulation, 1887, are not acted upon—Punjab Frontier Crimes Regulation, 1887, Sections 10, 12.

Held that the Civil Courts are not debarred from enforcing the provisions of the Pre-emption Act, 1905, merely because on a Reference by the Deputy Commissioner a Jirga had passed a Resolution amounting to an authoritative statement of a general custom to the effect that the members of one Biloch *tuman* in the Dera Ghazi Khan District, should not be allowed to acquire lands in the territory of another *tuman*, when such reference had not originated in a definite dispute of a character mentioned in Section 10 of the Punjab Frontier Crimes Regulation, 1887, and when the Deputy Commissioner had taken no action under any of the clauses of sub-section 3 of that section.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated 3rd July 1907.

Gokal Chand, for appellants.

Roshau Lal and Vishnu Singh, for respondents.

The judgment of the Court was delivered by

SHAH DIN, J.—The facts of this case are very simple. By a 30th Octr. 1908. registered deed, dated the 5th May 1905, defendant No. 1, who is a Syad, sold to defendant No. 2, an Arora, 95 *kanals* 10 *marlas* of land attached to the Hamidwala well, situate in *mauza*

Gudai, in *Tuman Laghari*, *tahsil* Dera Ghazi Khan. Defendants Nos. 3 and 4 brought separate suits for pre-emption in respect of the said sale and obtained separate decrees within one year from the date of the sale conditional on each of them paying the purchase-money into Court within certain prescribed periods. The money, however, was not so paid, and both the decrees, therefore, became null and void, and the suits stood dismissed as against the vendee.

On the 15th January 1906, the present suit was instituted by plaintiffs-appellants, who are Khosas by caste and reside in *mauza* Gudai, for possession by pre-emption of the land sold by the deed of the 5th May 1905, on the ground that they as co-sharers in the *khata* of which the land in dispute formed part were entitled to a preferential right of purchase both as against the vendee, defendant No. 2, and as against the rival pre-emptors, defendants Nos. 3 and 4, who had allowed their decrees to become null and void by failing to pay the purchase-money into Court within prescribed periods.

The suit was resisted only by defendant No. 2, the vendee, who admitted the plaintiffs' right of pre-emption on the grounds stated in the plaint, but pleaded that the plaintiffs being Khosas were precluded from suing for pre-emption in respect of the land in dispute "by reason of the Frontier Law and "the decision of the Jirga of all the Tumandars to the effect "that persons of the Khosa tribe shall not purchase land "in *Tuman Laghari* and similarly persons of the Laghari "tribe shall not purchase land in *Tuman Khosa*."

The Court of First Instance framed four issues, of which the third issue was the most important, relating, as it did, to the alleged incapacity of the Khosa plaintiffs to pre-empt the land in dispute by reason of the decision of the Jirga set up by the vendee. On all the issues except the third the Court found in favour of the plaintiffs; but on the third issue it held that according to the decision of the "Jirga Kalan", which had received the sanction of Mr. Thompson, Deputy Commissioner of Dera Ghazi Khan, on the 29th March 1898, the plaintiffs, who were members of the Khosa tribe, were debarred from purchasing land in *Tuman Laghari*, and being of opinion that a Civil Court was bound to follow the decision aforesaid, it dismissed the plaintiffs' suit.

On appeal by the pre-emptors, the learned Divisional Judge remanded the case for retrial of certain issues seven

in number, under Section 566 of the Civil Procedure Code. The sixth issue, with which alone at the present stage of the litigation we are concerned, ran as follows :—

“Is Jirga resolution of 29th March 1898 valid under “Regulation IV of 1887, and is it binding on the Civil Courts in pre-emption suits filed under the Pre-emption Act of 1905 ?”

In connection with this issue the Court of First Instance was directed to look into the file of the proceedings of 1898 in order to ascertain in what capacity the Jirga was acting.

In the return made to the order of remand the Court of First Instance adhered to the opinion expressed by it before, observing that “the resolution embodied an admitted custom, “and in my humble judgment the Civil Courts must abide “by it.”

On receiving the return, the learned Divisional Judge discussed at some length the question raised in the sixth issue as framed by him, and came to the conclusion that the decision of the Jirga above referred to was, under “the wide “powers conferred on Jirgas by the Frontier Crimes Regulation,” and which were not abrogated by Punjab Act II of 1905, an effectual bar to the plaintiffs’ claim as a result he agreed with the Court of First Instance and dismissed the suit.

The plaintiffs have appealed to this Court, and on their behalf it is contended that the resolution of the Jirga, dated the 29th March 1898, constitutes no bar to the plaintiffs’ suit, and that the grounds upon which the decision of the Divisional Judge is based are absolutely unsound. As the point involved in this appeal is characterised by the learned Divisional Judge as being both “important and novel,” it would perhaps be as well to reproduce the material portions of his judgment here, if only to see in detail the reasons on which his final opinion is founded.

The judgment runs as follows :—

“This appeal raises an important and novel point under “the Frontier Crimes Regulation. In 1895-98, certain civil “disputes were referred under that regulation to a Jirga, and “the decision arrived at was set forth in an order by “Major Powney Thompson, Deputy Commissioner, of 29th

“ March 1898. By that order it was placed on record that
“ the members of one Baloch *tuman* in the Dera Ghazi Khan
“ District should not, as a rule, be allowed to acquire land
“ in the territory of another *tuman*. The Pre-emption Act of
“ 1905 does not provide for the maintenance of the various
“ *tumans* in Dera Ghazi Khan District, an object which the
“ Jirga and the Deputy Commissioner clearly had in view.
“ It does not clearly appear that Major Powney Thompson’s
“ policy has been carried out consistently, or that lands in
“ each *tuman* under mortgage to strangers have been re-
“ deemed, and the present sale itself illustrates how little
“ regard has been paid to the Jirga’s resolution, for the
“ land in suit was originally sold by its Syad owners to one
“ Kaura Mal, an Arora. The defendants Nos. 3 and 4 sued as
“ pre-emptors and got a decree which they modified out of
“ Court allowing Kaura Mal to retain two-thirds while they took
“ only one-third. Defendants Nos. 3 and 4 are also Syads.
“ They indeed sued successfully as pre-emptors, but allowed
“ their decree as regards two-thirds to become a nullity. The
“ plaintiff-appellant, who is a Khosa, claims pre-emption
“ seeking to take advantage of the inability of defendants Nos.
“ 3 and 4 to pay into Court the full sum decreed to Kaura
“ Mal, vendee, and base their claim on the fact that they are
“ co-sharers. Their (plaintiffs’) answer to the Jirga’s re-
“ solution is that they are permanent residents in this, the
“ Laghari *Tuman*, though they are Khosas by tribes.

“ The position then is this. Had plaintiffs applied under
“ the Frontier Crimes Regulation, and had dispute been referred
“ to a Jirga, they would presumably have been met by the
“ answer that the resolution of the Jirga debarred them
“ from suing because, though they are co-sharers in this land
“ which lies in the Laghari *Tuman*, they are Khosas, and as
“ such are still subjects of that tribe and subject to its
“ usages. Under the resolution of the Jirga it may be not
“ unreasonably held that it is now a settled custom that a
“ stranger shall not be allowed to pre-empt or otherwise acquire
“ land in any given *tuman*, unless he has taken up his abode
“ in that *tuman*, and become completely affiliated to it. Pre-
“ sumably the Deputy Commissioner would so hold, see his
“ note of the 9th May 1907, and a Jirga to whom any such
“ dispute was referred, would follow that dictum. The word-
“ ing of the section of the present Frontier Crimes Regulation
“ is not quite clear as it only ousts the jurisdiction of the
“ Civil Courts when a dispute has been referred to a Jirga

“and does not bind, in express terms at least, the Civil Courts to follow the expressed resolutions of a Jirga. It would, however, cause a very awkward conflict of jurisdiction if the Civil Courts did not follow those resolutions where possible, and it would be exceedingly anomalous if the Civil Courts followed the letter of the Pre-emption Act, while the Jirga adhered to its own resolutions in regard to all pre-emption disputes referred to it. The resolution in this case was passed long before the Act came into force, and does not over-ride it. Rather the question is whether the Act over-rides not only the Jirga's resolution in this particular case and generally the whole system under which Jirgas have power to decide all disputes referred to them. In the present case to over-ride the resolution might well lead to a rush of pre-emption suits by strangers to every *tuman*, resulting in serious menace to the public peace and the complete, even rapid, disintegration of the *tumans*. This was assuredly not the object of the Act.

“It is hardly necessary to say that I feel keenly the difficulties involved in this decision, but I base my finding on the ground that wide powers having been conferred on Jirgas by the Frontier Crimes Regulation it was not intended to abrogate those powers by Act II of 1905, which was passed by the Legislature without any reference, express or otherwise, to the Regulation. In a wide sense the Jirga has no doubt legislated by its resolution, but in reality all it has done is to proclaim that it will decide a certain kind of dispute on certain definite principles in all cases. That is eminently reasonable, and I am not prepared to hold that by merely filing an anticipatory suit in a Civil Court a man can oust the jurisdiction of the Jirgas.”

Before I proceed to discuss the reasons adduced by the learned Divisional Judge for holding that the decision of the Jirga, dated the 29th March 1898, bars the plaintiffs' suit, it would be convenient to ascertain what it is that that decision precisely lays down. The file of the proceedings which terminated in the decision in question is headed thus:—

S. Tagga Khan, Tumandar, Laghari,

Versus

Certain Khosas who have possession of lands in this *tuman* which he desires should be given back to him.

An office note on the file, which is dated the 22nd March 1897, contains a summary of the previous disputes, originating in January 1895, which involved the question of the undesirability of members of the Khosa tribe holding or acquiring land by mortgage or sale in *Tuman* Laghari. On the 24th March 1897 Major P. Thompson, Deputy Commissioner of Dera Ghazi Khan, ordered that the question be laid before the full Tumandars' Jirga for opinion. The following extract from his order will serve to explain the nature of the question raised :—

“ The points which will have to be considered are—

“(1) How do the questions now raised affect Khosas
“ or Lagharis who have been for many
“ years residing in the territories of the other
“ tribe ?

“(2) I do not think the Jirga can recommend that
“ their possession of lands they have been in
“ possession of for years can be disturbed, but
“ another question is whether these men can
“ acquire more lands in the same territory. From
“ what I know there are many Khosas in the
“ Laghari *Tuman* who for all administrative pur-
“ poses are treated as Lagharis, *e. g.*, Khan Mati
“ Khan of Kaimwala, and I do not think the
“ Laghari Chief can raise any objection to these
“ men acquiring more land.

“(3) The main question on which the case depends is
“ whether Khosas acquiring land in the Laghari
“ *Tuman* or Lagharis acquiring land in the
“ Khosa *Tuman* by so doing become part of
“ the *tuman* in which the land is acquired.”

The finding of the Jirga on the questions referred is explained and discussed by Major P. Thompson in his final order, dated the 29th March 1898. The following extracts from that order will suffice for our present purpose :—

“ The Jirga finds that it is neither feasible nor desirable to disturb any completed sales of land.

* * * * *

“ The Jirga recommends that these mortgages should be
“ immediately or at any time redeemable by the Laghari Chief
“ or his tribesmen, and that sales or mortgages of land

“within the Laghari tribal limits to these Khosas should
 “hereafter be considered illegal, *i.e.*, voidable at the instance
 “of the Laghari Chief or his tribesmen. * * * *
 “It is obviously desirable that the acquisition of land by
 “members of another tribe within the Laghari tribal limits
 “should be restricted as far as possible, and it is shown that
 “general custom points to such acquisition being voidable.

* * * * *

“In the present case the Jirga have merely set forth
 “their finding on a general custom. The reference to the
 “Jirga was made for an opinion, and they have given it and
 “I agree with it.

“The Laghari Chief or any of his tribesmen may now
 “apply under Section 10, Frontier Crimes Regulation, for the
 “redemption of any of the mortgages at present in existence,
 “and these applications will be separately dealt with on their
 “merits.

* * * * *

“For the future the Jirga finding has established that
 “a custom exists as shown above, and this custom will bear on
 “Section 12 of Act IV of 1872 as regards the land within the
 “Laghari and Khosa tribal limits.”

The note of the Deputy Commissioner, dated the 9th
 May 1907, to which the Divisional Judge refers in his
 judgment, is one made by that officer upon the record of this
 case having been sent up to him under orders from the
 Divisional Judge with reference to the 6th issue as framed by
 the latter in his order of remand. In that note the Deputy
 Commissioner observes :—

“The Jirga’s resolution of the 29th March 1898 is, I think,
 “merely a statement of opinion on a question of custom, and
 “should be taken into consideration as evidence by Civil Courts
 “when questions of such custom arise.”

I have given the above excerpts from the final order
 of Major P. Thompson, dated the 29th March 1898, and from
 the note of the Deputy Commissioner, dated the 9th May
 1907, with a view to indicate the precise nature and value
 of the resolution of the general Tumandars’ Jirga, which has
 been held by the Divisional Judge to be a bar to the plaintiffs’
 suit for pre-emption. It will be observed that the reference
 to the Jirga made by the Deputy Commissioner, which

ultimately resulted in the finding embodied in the order of the 29th March, did not originate in a definite dispute of a character mentioned or referred to in Section 10 of Regulation IV of 1897, and that the Deputy Commissioner did not intend to proceed, and as a matter of fact took no action, under that section. For after stating that the Jirga had "merely set forth their finding on a general custom," the "Deputy Commissioner went on to say that the Laghari "Chief or any of his tribesmen may now apply under Section "10, Frontier Crimes Regulation, for the redemption of the "mortgages at present in existence, and these applications "will be separately dealt with on their merits." On receipt of the finding of the Jirga, the Deputy Commissioner merely recorded his agreement with it, as embodying an authoritative statement of custom, and neither referred the parties to the Civil Court, nor passed a decree in accordance with that finding under Section 10, sub-section (3), clause (c) or clause (d), for the obvious reason that no reference at all had been made to a Council of Elders under Section 10 of the Regulation. That being the case, it is quite clear that whatever may be the value of the opinion of the Jirga on a question of intertribal custom as embodied in the final decision of the 29th March 1898, the jurisdiction of a Civil Court in respect of a claim similar to the one which is at present being adjudicated upon is not ousted by reason of that decision under the provisions of Section 12 of the Regulation, which lays down that "a Civil Court shall not take cognizance "of any claim with respect to which the Deputy Commissioner has proceeded under Section 10, sub-section (3), clause (a), clause (b), or clause (d)." As obviously the Deputy Commissioner did not so proceed and could not have so proceeded, seeing that there was before him no specific dispute between ascertained parties who could have been arrayed as such in a civil suit, so as to satisfy the requirements of Section 10 of the Regulation, a Civil Court is not debarred from taking cognizance of a claim with respect to which the Deputy Commissioner could have, but has not so far, proceeded under the provisions of the aforesaid section. In fact, under that section the Deputy Commissioner is precluded from making a civil reference to a Council of Elders with regard to a dispute if a suit is pending in respect of it, from which it is clear that it is only where the Deputy Commissioner has, as a matter of fact, taken definite cognizance of a particular dispute under circumstances specified in Section 10 and made a reference in regard to it

to a Council of Elders, and has subsequently taken action under any one of the clauses (a), (b), and (d) of sub-section (3) thereof that the jurisdiction of a Civil Court in respect of it is ousted.

The Divisional Judge seems to have recognised the force of the contention that under the Frontier Crimes Regulation the jurisdiction of Civil Courts is not taken away unless and until a dispute has actually been referred to a Jirga, and that its resolutions as such are not binding on them. But he thinks that "it would cause a very awkward conflict of jurisdiction if the Civil Courts did not follow those resolutions where possible." I confess I cannot see any semblance of "a conflict of jurisdiction" arising in any particular case if the provisions of Regulation IV of 1887, which admit of no possible ambiguity, are duly complied with, though it is no doubt true that in the event of a civil reference being made by the Deputy Commissioner to a Council of Elders under Section 10 of the Regulation in connection with a dispute in respect of which a suit is not pending in a Civil Court, the Jirga may (and in a case similar to the one before us probably would) give a finding at variance with the pronouncement of the Civil Court under the provisions of the legislative enactment applicable to the case. Nor do I see how it can be said that in this case the plaintiffs have "by merely filing an anticipatory suit in a Civil Court sought to oust the jurisdiction of the Jirga." The filing "of an anticipatory suit" if the phrase be allowed, is expressly sanctioned by Section 10 of the Regulation, and as laid down in Section 12 there can be no improper ouster of the jurisdiction of a Jirga unless and until the Deputy Commissioner has definitely proceeded under Section 10, sub-section (3). There is no pretence for saying that in connection with the pre-emption dispute before us any action has been taken at all by the Deputy Commissioner under Chapter III of the Regulation.

Another aspect of the matter which it seems to me has been overlooked by the Divisional Judge is that the Jirga resolution of 1898, so far as it went, at best only established the existence of a custom prohibiting the future mortgage and sale in favour of a Khosa of lands situate within the Laghari tribal limits, and that the Deputy Commissioner, while agreeing with that resolution, was careful to note that "this custom will bear on Section 12 of Act IV of 1872." That

section expressly saved custom in its application to pre-emption disputes, whereas the Punjab Pre-emption Act, 1905, has abolished custom so far as sales of agricultural land and village immovable property are concerned. In the present state of the law, therefore, we are not concerned with custom in this case, and for the purposes of this litigation it is perfectly immaterial what the opinion of the Tumandars' Jirga is, or may have been, in regard to the undesirability or otherwise of a Khosa purchasing or pre-empting land situate within the territorial limits of the Laghari tribe. Civil Courts have to interpret and apply the law as they find it, unmindful of the untoward consequences that may follow from their decisions in particular cases because of different or even opposite conclusions being arrived at under similar circumstances by a properly constituted Jirga under the Frontier Crimes Regulation. For the foregoing reasons I hold differing from the Divisional Judge, that the resolution of the Tumandars' Jirga passed in 1898, constitutes no legal bar to the plaintiffs' suit for pre-emption.

Mr. Vishnu Singh, who appeared for Abdulla Shah respondent, faintly argued that the plaintiffs' suit cannot succeed as against his client to the extent of the one-third share of the land in dispute which, under the compromise entered into between the vendee and Abdulla Shah after a pre-emption decree had been passed in favour of the latter, has come into his possession. This contention is, I consider, utterly devoid of force, and I agree with the Courts below in holding that Abdullah Shah having omitted to pay the purchase-money into Court within the period fixed for the purpose, his suit for pre-emption stood dismissed and that the so called compromise entered into between him and the vendee did not save the decree in his favour from becoming null and void.

I would accept this appeal and pass a decree in favour of the plaintiffs for possession by pre-emption of the land in dispute conditional on the plaintiffs paying into Court the sum of Rs. 606 on or before the 15th of January 1909, failing which the suit shall stand dismissed with costs.

As the vendee was apparently justified in resisting the plaintiffs' suit by reason of the decision of the Jirga, which is generally regarded in the Dera Ghazi Khan District as binding on members of all the *tumans*, I would direct that the parties bear their own costs throughout.

KENSINGTON, J.—I agree with my learned colleague 31st Oct. 1908.
throughout, and the decree will be as proposed by him.

I have only to add by way of explanation that we are able to deal with the case finally as there is no dispute before us either regarding the plaintiffs' right of pre-emption under the Punjab Pre-emption Act or as to the amount of the purchase-money. Counsel have confined their arguments to the questions about (1) the effect of the Jirga proceedings of 1898, and (2) the minor arrangement said to have been entered into out of Court by the vendee and the previous pre-emptor Abdulla Shah.

Appeal allowed.

No. 27.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

KESAR AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SUNDAR SINGH,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1454 of 1907.

Custom—Alienation—Sale by limited owner—Failure to prove payment of the whole of the consideration—Maintainability of such sale.

Held that a sale of immovable property by a limited owner ought not to be maintained, where a considerable fraction of the whole consideration is found to have been previously inserted to keep off pre-emptors and formed no part of the price actually paid.

The Courts should in such a case lean to the side of strictness and refuse to allow a party in a suit to take advantage of his own fraud.

Further appeal from the decree of Sheikh Asghar Ali, Additional Divisional Judge, Sialkot Division, dated 22nd October 1907.

Roshan Lal, for appellants.

Beechey, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—The particulars of the claim and defence in 31st Oct. 1908.
this case are thus stated by the first Court :—

“On the 2nd October 1901, one Haveli, Jat, of mauza
“Padianwala, sold 168 kanals and 5 marlas of his land to one
“Sundar Singh for Rs. 950, and got the deed of sale registered.
“Haveli died without issue about 8 months ago.”

“ The plaintiffs, who are cousins and nephews of the said Haveli, sue for possession of the land in question, and state that the deed of sale is fictitious and was executed without valid necessity.

“ The defendant denies the claim and pleads that the sale was made with plaintiff's consent and for lawful consideration and legal necessity, that the land had been mortgaged by the late Haveli's father Talin, to Narain Singh and Bishen Das for Rs. 750, and the defendant, having paid the mortgage-money, redeemed the land from them, and paid the balance to the said Haveli for necessary expenses.”

The first Court held that the transaction had been for consideration and valid necessity to the extent of Rs. 794, and declared that amount only to be a charge upon the property, and gave plaintiff a decree for possession on payment of that sum.

From this decree the defendants only appealed, the plaintiffs did not appeal.

The Lower Appellate Court went somewhat out of its way to consider the various items allowed by the first Court. Inasmuch as the plaintiffs had not appealed, it had no concern with amounts decreed in the defendants' favour, and had only the question of the Rs. 156, disallowed by the first Court to consider in this particular connection, and it is only this item, which we can take into consideration here.

As regards this Rs. 156, which is a considerable fraction of the whole, about one-sixth, the learned Divisional Judge holds that this sum was certainly not paid, but was merely inserted to keep off pre-emptors and formed no part of the real price, and that Rs. 156 being only a fraction of the whole, he maintains the transaction as a sale.

Taking the fact that Rs. 156 out of Rs. 950 were clearly not paid, and that this item was inserted to keep off pre-emptors, who would of course be the very persons now suing, we are quite unable to accept the view of the learned Divisional Judge. Parties to suits in this country are far too much given when confronted with previous acts of their own which tell against their case, to calmly put forward the plea that their previous statements were untrue, or their acts fraudulent. Sometimes these falsehoods and frauds are of such a nature that, although exceedingly reprehensible, they can still be

pleaded as a defence in a particular case. More often they cannot, and the Courts in our opinion should always lean to the side of strictness in such cases, and sternly refuse whenever possible to allow any party in a suit to take advantage of his own fraud. Here we think these principles are particularly applicable. A man cannot be allowed to show the items of consideration in a deed as one thing to serve his own purpose, and then when legitimately challenged to support the statements of his deed in a different class of claim, calmly to turn round and say that certain entries were fraudulent, and to defeat pre-emption. We must do the defendant in this case the justice to say that he has, so far as we can see, never attempted to set up this plea. It was supplied by the learned Divisional Judge.

We hold that it having been shown that Rs. 156 out of the total of Rs. 950, was never paid at all, the First Court's judgment was correct, and the transaction cannot be maintained as a sale. We accept the appeal, set aside the judgment and decree of the learned Divisional Judge and restore that of the first Court.

Costs against the respondent throughout.

Appeal allowed.

No. 28.

Before Sir William Clark, Kt., Chief Judge.

SARDAR SHAH AND OTHERS,—(DEFENDANTS),—
PETITIONERS,

Versus

HAJI,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1459 of 1908.

*Guardian and ward—Alienation by de facto guardian—Contract void—
Suit by ward for recovery of property so alienated—Limitation for such suit—
Limitation Act, 1877, Articles 44, 91, 144.*

Held that an alienation by a Muhammadan uncle as a *de facto* guardian of his nephew's property is void *ab initio*, and consequently a suit for the recovery of the property against the alienee in such a case is governed by Article 144 and not by Articles 44 and 91, as he is not bound to set aside the alienation or to sue under either of those Articles.

Petition for revision of the order of Captain A. A. Irvine, Divisional Judge, Lahore Division, dated 27th May 1908.

Lal Chand and Fazl-i-Husain, for petitioners.

Sukh Dial and Tirath Ram, for respondent.

The judgment of the learned Chief Judge was as follows :—

30th Oct. 1908.

CLARK, C. J.—In 1896 Mahomda, the uncle of plaintiff, a minor, and Mussammat Mehran, sold 13 kanals $8\frac{1}{2}$ marlas of land for Rs. 250 to one Karam Bakhsh.

Mahomda had one-fourth share, plaintiff one-fourth share, and Mussammat Mehran half share in the land.

Plaintiff, who was 23 years of age when he filed this suit, sues for possession of three-fourths of the land, namely his own one-fourth on the ground that his uncle had no power to sell his share, and for Mussammat Mehran's share, because she remarried six months after the sale, and had no necessity for the sale.

The first question for consideration is whether plaintiff's claim as regards his one-fourth share is barred by limitation under Article 44, Schedule II, of the Limitation Act, that is whether Mahomda was plaintiff's guardian within the meaning of that article.

The powers of a *de facto* guardian were considered by a Full Bench (*Mastu v. Nand Lal* ⁽¹⁾), and Mr. Justice Rivaz remarked :
“ The rule to be deduced from these cases applicable to this
“ province appears to be that in the absence of a special
“ custom to the contrary a *de facto* guardian who is neither a
“ near guardian by Muhammadan law nor by appointment by
“ the Court, cannot bind the minor's property by his acts of
“ alienation.”

This rule has been followed in the later decisions of this Court.

An attempt was made in this case to prove that there was a custom admitting an uncle to alienate his minor nephew's property. I am unable to hold that the instances of acquiescence in transfers by uncles of their minor nephews' property prove a custom. In *Rahim Baksh v. Ghulam* ⁽²⁾, the same view was taken. *Said Shah v. Abdulla Shah* ⁽³⁾ differs from this case, because there it was held that the record of rights appointed the brother guardian, *i.e.*, that there was a custom of appointing a brother as guardian.

As I hold that in this case no such custom is proved, it follows that Mahomda was not a guardian within the meaning of Article 44.

⁽¹⁾ 73 P. R., 1890, F. B.

⁽²⁾ 65 P. R., 1893.

⁽³⁾ 19 P. R., 1902.

The sale by Mahomda of plaintiff's share was altogether void, and plaintiff was entitled to treat it as a nullity, and not bound to set it aside, nor to sue under either Article 44 or 91 of Schedule II of the Limitation Act (*vide Ghulam Rasul v. Ajab Gul* ⁽¹⁾ and *Hafiz Karim Bakhsh v. Mussammat Begam Jan* ⁽²⁾).

As regards Mussammat Mehran's half. It has been found by the Divisional Judge that it was not sold for necessity, and I see no reason for differing. Even if Mussammat Mehran had a daughter to marry, it is not shown that this money was advanced for that purpose. The fact that Mussammat Mehran remarried herself within six months of the sale makes it probable that she would try to raise what she could on the estate, before she lost it by remarriage.

The Divisional Judge however is in error in giving plaintiff a decree for the whole of Mussammat Mehran's half share. Mahomda is entitled to half her share.

I so far accept the revision as to give plaintiff a decree for possession of his one-fourth share and half of Mussammat Mehran's half share, or altogether half of the property claimed. Under the circumstances of the case, which has been financed for plaintiff by outsiders, I leave the parties to bear their own costs throughout.

No. 29.

Before Mr. Justice Rattigan.

ILAHIA,—(PLAINTIFF),—PETITIONER,

Versus

IMAM DIN AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 356 of 1908.

*Muhammadan Law—Marriage—Marriage of widow during her iddat—
Legality of such marriage.*

Held that a marriage contracted by a widow before the expiry of the period of her *iddat* is unlawful and void, and the mere fact that prior to the expiry of her *iddat* she has been delivered of the child with which she was pregnant at the date of her late husband's death cannot validate a marriage illegally solemnised before that period had elapsed.

Petition for revision of the order of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 9th October 1907.

K. C. Chatterji, for respondents.

(¹) 57 P. R., 1891.

(²) 52 P. R., 1895.

The judgment of the learned Judge was as follows :—

5th Novr. 1908.

RATTIGAN, J.—A very important question of Muhammadan Law is involved in this case. The facts proved or alleged are as follows :—

One Mussammat Budhi, defendant No. 2, was the wife of a man named Jumma. The latter died and at the date of his death, his widow was pregnant with child. The child was born within four months and ten days of Jumma's death, and after the birth of the child but also within the said period of four months and ten days, the plaintiff Ilabia, the brother of the deceased Jumma, alleges that he duly married his late brother's widow. Defendants deny that this second marriage ever in fact took place, but the learned Divisional Judge has held that even upon the assumption that the alleged remarriage was duly effected, it was invalid and void according to the principles of Muhammadan Law inasmuch as it took place within the period of the woman's *iddat*, or in other words, within the aforesaid period of four months and ten days. The learned Judge held that the mere fact that the woman had prior to the expiry of that period been delivered of the child with which she was pregnant at the date of her late husband's death could not validate a marriage solemnised before the said period had elapsed.

The plaintiff has preferred an application for revision to this Court and I regret that he has not been represented by counsel, as it is most unfortunate that a question of this importance should have to be decided more or less *ex parte*. I have myself consulted the authorities ordinarily available and have endeavoured to arrive at a correct conclusion. It seems to me, however, that the decision of the Lower Appellate Court is right and that the passage in Baillie's Digest of Muhammadan Law (Volume 2, pages 164, 165) upon which it relies, fully supports its conclusions.

This passage runs as follows :—

“ A free woman married by a valid contract should
“ keep *iddat* for the death of her husband during four months
“ and ten days when she is not pregnant, whatever be her
“ age, whether she is a child or full grown, and whether
“ her husband had arrived at maturity or not ; If
“ she is pregnant, the *iddat* is the largest of the two periods,
“ that is, it is prolonged to delivery if that should not

“occur till after the expiration of four months and ten days from her husband's death, whereas if she is delivered before the expiration of that time she is to wait for its completion.”

The rule is, it would seem, different in the case of a woman who has been divorced, for in such a case if the woman be pregnant at the time of the divorce, her period of *iddat* continues until her delivery and then terminates, apparently whether or not such delivery takes place within the period otherwise prescribed for *iddat* in the case of divorced women, (see Wilson's Digest of Anglo-Muhammadian Law, 2nd Edition, paragraph 32). The reason for this distinction between the two cases may possibly be that *hedad* or mourning for her deceased husband is incumbent on a widow for a prescribed period and that during such period she must abstain from everything by way of dress or ornaments intended to beautify or adorn her person. Presumably it is on this ground of respect and mourning for her late husband that she is absolutely forbidden under any circumstances from remarrying within the stated period. The passage from the Koran printed at page 514 of Wilson's Digest supports this view. It runs as follows:—“Such of you as die and leave wives, their wives must wait concerning themselves four months and ten days.” The rule would thus appear to be absolute and unqualified, whether or not the widow was pregnant at the time of her husband's death, and, as I understand, the principles of the Muhammadan Law, this period of *hedad* is not to be curtailed, simply because the widow happens to be delivered of a child before the expiry of the four months and ten days. This is her period of *iddat* and according to these principles a marriage contracted by a widow before the expiry of the period of *iddat* is unlawful, and is absolutely void if the man to whom she has so married had knowledge of the fact that the period of *iddat* had not expired when the marriage with him took place, (*Mussammatt Bibi v. The Emperor* ⁽¹⁾). In the present case as the plaintiff is the brother of the woman's late husband, it is impossible to believe that he did not know that he was marrying the woman within four months and ten days of his brother's death. This fact is indeed not denied by the plaintiff. On the contrary, he admits it. It is suggested in the ruling to which I have referred that very possibly among agriculturists whose knowledge of the *Shara* is at best very elementary, custom may permit of the celebration of a re-marriage within

(¹) 43 P. R., 1882, Cr.

a period considerably shorter than that recognised by Muhammadan Law. The parties in this case are village *kamins*, but it has not been contended that they follow any custom at variance in this respect with the principles of their personal law, and in reply to a question from me the plaintiff admitted that he knew of no such customary rule. It would therefore be a mere waste of time and would involve the parties in unnecessary expense if I remanded the case for inquiry as to the possible existence of a customary rule upon this point.

I must accordingly dismiss this application with costs, and I order to that effect.

Application dismissed.

No. 30.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

PREMI,—(DEFENDANT),—APPELLANT,

Versus

KHUSHAL SINGH,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE. }

Civil Appeal No. 221 of 1906.

Custom—Inheritance—Widow of son who has predeceased his father—Randhawa Jats of Amritsar District.

Found that by custom among Randhawa Jats of the Amritsar District the widow of a predeceased son succeeds to the property of her father-in-law against the brother of the last male owner.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Amritsar Division, dated 26th January 1906.

Daulat Ram, for appellant.

M. M. Mukerji, for respondent.

The judgment of the Court was delivered by

14th Jany. 1907.

LAL CHAND, J.—This is a case of contested succession between the widow of a predeceased son and the uncle of her deceased husband. The parties are Randhawa Jats of Amritsar Tahsil and District. The land in dispute was owned by one Nihal Singh, father-in-law of Premi, defendant, and own brother of plaintiff Khushal Singh. Nihal Singh had a son

Ishar, who predeceased him, and on his death in 1895 the land in dispute was recorded in favour of his widow Mussammat Gulabi and Mussammat Premi, his widowed daughter-in-law, in equal half shares. In 1899 part of the holding was mortgaged by the two widows to Hari defendant, the mortgage-deed being attested by plaintiff Khushal Singh. Mussammat Gulabi died on 22nd March 1904 when the whole of Nihal Singh's share in the holding was mutated in name of Premi, defendant. Hence this suit by Khushal Singh for possession on an allegation that by custom Mussammat Premi, widow of a predeceased son of Nihal Singh, plaintiff's brother, is not entitled to succeed as heir of Nihal Singh, but is entitled to receive only maintenance. The issue fixed was "Is a widow entitled to retain possession of the property of her father-in-law till her death." The issue was not properly worded, but the parties fully understood the nature of the dispute which was a matter of contested succession between the widow of a predeceased son and the brother of the last male owner. The Lower Courts have differed. The First Court has found in defendant's favour and has dismissed the suit.

The Lower Appellate Court has held that defendant has failed to prove her right to succeed by custom and has decreed possession of 12 *bighas* in defendant's favour by way of maintenance. There is hardly any room for doubt that the evidence on the record on the question of custom preponderates decidedly in defendant's favour. She produced as witnesses five patwaris of different villages in Tarn Taran and Amritsar *tahsils* who have deposed to nine instances among Randhawa Jats where the widows of predeceased sons have succeeded to a share even in the presence of the surviving brothers of their deceased husbands. The instances were proved by mutation proceedings which have not hitherto been challenged. The quantity of land inherited in each case is not given, but though it is desirable that such information should have been elicited and placed on the record it cannot be assumed that the land inherited in each case was small in area and sufficient only for maintenance. It is further shown that in some of these instances the widows held separate possession of portions inherited separately in each case. Moreover in the present case mutation in an equal half share was effected in defendant's favour on death of Nihal Singh in 1895, and although this fact alone might not have been very material as Nihal Singh's widow was then alive it bears significant importance in the present

case under the following circumstances. In 1899 the two widows joined as co-owners in mortgaging a part of the inherited property to Hari Mal, defendant. The mortgage-deed was attested by plaintiff who thereby recognised that Premi, defendant, was entitled to a share, and during the course of the present litigation he has unequivocally accepted the validity of the mortgage. The holding was originally joint of plaintiff and the widows, but it is proved that since 1898 the widows have held separate possession of their share in the land, and for nine years the mutation effected in Premi's favour as an heir has remained unchallenged by plaintiff who had undoubted knowledge being a co-sharer and having attested the mortgage of 1899. Against this proof the plaintiff has practically produced no rebutting evidence. He produced two witnesses who were unable to support their statements by any verified instances. The first witness gave an instance in his own family which was not relevant and the second witness referred to a case which could not be traced. It is of some significance that if the custom were so general excluding the widow of a predeceased son as is alleged the plaintiff should have failed to adduce instances to support his allegation or to rebut the proof given by defendant. One decided case in the village was referred to by plaintiff, but it turned entirely on the question of *onus* and failure of defendant to produce instances. The Divisional Judge has disposed of the present suit against defendant for the reason that "the instances given by the witnesses from memory, which instances did not go to Court, are not sufficient to rebut the case law and the general presumption which on the whole are opposed to the right set up by the widow." The instances quoted were not given by the witnesses from memory. The instances were deposed to by the patwaris who supported their evidence by mutation registers produced in Court.

As regards the case law, the authorities quoted are *Chet Singh v. Mussammat Ratan Kaur* ⁽¹⁾, *Muhammad Khan v. Mussammat Hussain Bibi* ⁽²⁾, *Mussammat Rup Kour v. Kishen Singh* ⁽³⁾, *Sohna v. Mussammat Bhago* ⁽⁴⁾ and *Bahadar Singh v. Mussammat Nihali* ⁽⁵⁾, the last being referred to as in favour of the widowed daughter-in-law.

⁽¹⁾ 93 P. R., 1891.

⁽²⁾ 9 P. R., 1895.

⁽³⁾ 97 P. R., 1891.

⁽⁴⁾ 50 P. R., 1897.

⁽⁵⁾ 133 P. R., 1893.

These are however cases of a disputed succession between the direct descendant of the last male owner and the widow of his predeceased son and not between the latter and a collateral of the last male owner as in the present case. This is an important difference as shall appear later on.

Chet Singh v. Mussammat Ratan Kaur (1) was a case of Jats of Hoshiarpur District. The relationship of the disputants is not given in the judgment. Sir Charles Roe who remanded the case on further enquiry pointed out that "the point is" one in which custom varies and no general rule can be "laid down absolutely." On receipt of return it was held that the parties were Dhillon Jats and that instances given by the defendant widow were those of other Jat tribes, and that there was no general custom amongst Jats in favour of succession of daughters-in-law. The appeal was allowed against defendant but, considering that the case turned on a doubtful point of custom and that defendant was allowed to remain recorded for more than a year in possession of her husband's share, the parties were directed to pay their own costs throughout.

Muhammad Khan v. Mussammat Hussain Bibi (2) related to Gujars of Gujrat District. The dispute was between the widow of a predeceased son and his brother, i.e., the direct male lineal descendant of the last male owner, and it was held that the defendant had failed to establish the custom alleged by her in the affirmative. The case to the contrary, No. 8 of 1889, amongst Gujars of the same *tahsil* and district, was held to be founded almost entirely on the opinions of zaildars and officials, which the later and fuller enquiry was held to show as incorrect.

Mussammat Rup Kaur v. Kishen Singh (3) was again a case of contest between the widow of a predeceased son and the surviving son. It was a case of Punawan Jats of Tarn Taran *tahsil*, District Amritsar. It was found that in the instances quoted the widowed daughter-in-law had continued to reside with her brothers-in-law and the widow defendant was suspected of having murdered her father-in-law in order to gain exclusive possession of a half share of the estate. She was not held to have proved the alleged custom.

(1) 93 P. R., 1891.

(2) 97 P. R., 1893.

(3) 9 P. R., 1895.

The last case quoted against the widow, *viz.*, *Sohna v. Mussammat Bhago* ⁽¹⁾ was again a case of contest between the widowed daughter-in-law and brothers of her predeceased husband. The parties were Muhammadan Rajputs of *tahsil* Chunian, and it was held that the instances quoted entirely failed to establish the existence of the custom alleged by the widow.

There is one more case referred to in the judgment of the Divisional Judge, *viz.*, *Teja Singh v. Mussammat Atri* ⁽²⁾. This was a suit between a brother and the widow of a brother who predeceased his father. The parties were Mahtons of *mauza* Bahan in *tahsil* Hoshiarpur, and the question proposed for decision was "whether by custom among the Hindu Mahtons of the locality the widow of a predeceased son took on the death of his father a son's share in the ancestral land without the consent of the other sons or direct lineal heirs." It was found in the negative against the widow. The Divisional Judge has alluded to this case as not on all fours with the present case presumably on the ground that the contest there was between the direct lineal heirs of the last male owner and the widow of his predeceased son. But the same ground would obviously distinguish and render inapplicable the other cases quoted by him. In *Chet Singh v. Mussammat Ratan Kaur* ⁽³⁾, the relationship of the disputants is not given. In *Muhammad Khan v. Massammat Hussain Bibi* ⁽⁴⁾, *Mussammat Rup Kaur v. Kishan Singh* ⁽⁵⁾ and *Sohna v. Mussammat Bhago* ⁽¹⁾ the parties were related exactly as in *Teja Singh v. Mussammat Atri* ⁽²⁾, and the dispute was between the direct lineal descendants and the widow of a predeceased son of the last male owner. This distinction appears to me of considerable importance in deciding the question at issue. It is conceivable that a widow of a predeceased son may not be entitled to succeed against the direct lineal heirs, but it does not follow that she would necessarily be excluded from succession by a collateral heir. The collateral heir happens in this case to be the brother of her father-in-law, but in other cases he may be more remote as related in the third, fourth, or fifth degree. Would she then be excluded from succession, because her husband who would have succeeded, predeceased his father. None of the reported

⁽¹⁾ 50 P. R., 1897.

⁽³⁾ 93 P. R., 1891.

⁽²⁾ 115 P. R., 1893.

⁽⁴⁾ 97 P. R., 1895.

⁽⁵⁾ 9 P. R., 1895.

cases supports any such conclusion. All with one exception of *Mussammatt Jiwan v. Hari Singh* ⁽¹⁾ were cases of exclusion by direct lineal descendants and the distinction was not kept in view in *Mussammatt Jiwan v. Hari Singh* ⁽¹⁾.

But moreover a widow's right to represent her deceased husband in collateral succession has uniformly been affirmed in a number of cases and in several districts. The cases bearing on this subject are collected in *Saddan v. Khemi* ⁽²⁾, and there is a later case (*Lahori v. Radho* ⁽³⁾) affirming the same rule among Ghirts and other agricultural tribes of the Kangra District. The custom has been found to prevail among Arains of Jullundur District (*Rani v. Makhi* ⁽⁴⁾), Jats of Ludhiana District (*Mussammatt Chand Kaur v. Ram Singh* ⁽⁵⁾ and *Saddan v. Khemi* ⁽²⁾), Rajput and other agricultural tribes of Hoshiarpur District (*Puran v. Mussammatt Raj Devi* ⁽⁶⁾), Ghirts and other agricultural castes of Kangra District (*Lahori v. Radho* ⁽³⁾), and various sections of Jats in the Amritsar District (*Bahadar Singh v. Mussammatt Nihali* ⁽⁷⁾). In the last case the custom was established after an elaborate enquiry ordered by the Divisional Judge throughout the district, and although the result was characterised as a matter of surprise and at variance with the ordinary expectation the Judges were satisfied with the enquiry and had no hesitation in accepting it as decisive. Since then other cases have established the same custom and the matter is now no longer treated as extraordinary or unusual or exceptional (*Saddan v. Khemi* ⁽²⁾ and *Lahori v. Radho* ⁽³⁾).

The case then stands thus. The parties in the suit are Jats of Amritsar District. Nihal Singh, the last male owner, died in 1895 when his lands were entered in favour of his widow and his widowed daughter-in-law in equal shares. Plaintiff, a cosharer in the holding, was fully aware of this entry, but never objected. On the other hand, he attested a mortgage executed by the two widows jointly as cosharers in 1899. Since 1898 the widows have held separate possession and on the senior widow's death in 1904 the whole was apparently without any objections on plaintiff's part recorded

(1) 62 P. R., 1889.

(4) 146 P. R., 1889.

(2) 15 P. R., 1906.

(5) 20 P. R., 1895.

(3) 72 P. R., 1906.

(6) 56 P. R., 1891.

(7) 133 P. R., 1893.

in favour of defendant. There are nine instances relating to Jats of the same section supported by mutation entries where widows have succeeded even though the other claimant was a direct lineal descendant. These instances are not valueless, because there was no dispute. On the other hand "the very best" possible evidence of a custom is that which shows that it has "been followed consistently in a number of instances without dispute." *Saddan v. Khemi* (1), where four instances supported by entries in mutation orders were accepted as of high value to prove the alleged custom. The plaintiff has practically done nothing to rebut this proof, and the reported cases, with one exception already noted, do not relate to a matter of collateral succession as in the present case. On the other hand, it is conclusively established among Jats of the district to which the parties belong that, in matters of collateral succession, the widow of a predeceased husband fully represents her deceased husband and takes his place in the same manner as if he were alive when the succession opened. If the right of representation is by tribal custom conceded so far in favour of the widow, does it not follow as a matter of necessary corollary that she would not be excluded in succession to her own husband by a collateral of her husband? It is difficult to conceive any difference in the two cases from the customary or logical point of view. The main question in either case is whether a widow represents her deceased husband or not in matters of succession under the customary law. If she does represent, she would take the place of her husband, and as his substitute being a nearer heir to the last male owner would exclude the more remote.

The same rule would apply and ought to apply whether the last male owner happens to be the father or a collateral of her deceased husband. Custom may possibly, for obvious reason, introduce a modification where the opposing claimant happens to be the direct lineal descendant of the last male owner and such are some of the reported cases. Even here if the right of representation is found to prevail in favour of a widow, she might claim an equal right of succession which it would be difficult to deny. It has been found to exist in some cases quoted under paragraph 9 of Rattigan's

(1) 15 P. R., 1906.

Digest, excepting *Sohna v. Mussammat Bhago* ⁽¹⁾ which is misquoted and ought to range on the opposite side. It has moreover been found to exist in a large number of instances even in the cases quoted to the contrary where such instances were not held to prove the custom in the particular locality as in *Teja Singh v. Mussammat Atri* ⁽²⁾ or were otherwise held inadequate to prove the custom. I am not much impressed with the argument used in *Teja Singh v. Mussammat Atri* ⁽²⁾ based on a difference in *gôt*. After marriage the *gôt* of a daughter-in-law even among Jats is the *gôt* of her husband's family and not of her parents. And moreover, a daughter is excluded by agnates from succession in her father's family mainly by reason of her marriage in another family or *gôt*. And to say the least it would be anomalous to hold that she is excluded in the family of her marriage by reason of her *gôt* by birth being different. There are no other *à priori* considerations against her right if the right of representation is once conceded. However, in the present case we are not pressed with the weight of authorities to decide against the widow as these are clearly distinguishable as cases of claim by direct lineal descendants of the last male owner against the widow of his predeceased son. For the reasons then given already, we hold that the defendant is entitled to exclude plaintiff and to succeed to the property in dispute as a widow of Nihal Singh's predeceased son. We therefore accept the appeal, reverse the judgment of the Lower Appellate Court and restore the decree of the First Court with costs throughout.

Appeal allowed.

No. 31.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

DHIRTA,—(PLAINTIFF),—APPELLANT,

Versus

KESRI,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 897 of 1906.

Jurisdiction—Rules under Section 9 of the Suits Valuation Act, 1887—Value of suit for purposes of jurisdiction how far affected by new rules.

Held that the rules framed under Section 9 of the Suits Valuation Act, 1887, for the valuation of suits for custody of a wife, have not retros-

⁽¹⁾ 50 P. R., 1897.

⁽²⁾ 115 P. R., 1893.

pective effect and cannot, therefore, affect jurisdiction with respect to an appeal in a suit instituted before they came into force.

Further appeal from the decree of W. A. Le Rossignal, Esquire, Divisional Judge, Amritsar Division, dated 24th May 1906.

Shadi Lal, for appellant.

Gouldsbury, for respondent.

The case was referred to a Division Bench by the following order of the learned Judge in Chambers :—

3rd Jany. 1907.

RATTIGAN, J.—This is a suit for custody of wife and was instituted on the 26th October 1905. It was valued (for purposes of jurisdiction) in the original plaint at Rs. 510 and in the amended plaint at Rs. 520 (Rule I, (i) (b) of the Rules and Orders of the Chief Court, page 187). In the appeal to the Divisional Judge the suit was valued for the same purpose at Rs. 530, the appeal being presented on the 3rd April 1906. In this Court the value is given as Rs. 1,000 in accordance with the rule laid down in this Court's Correction Slip No. 96, dated 4th December 1905, which provides that suits of this class shall, for the purposes of the Suits Valuation Act and the Punjab Courts Act, be valued at Rs. 1,000. Mr. Gouldsbury contends that no further appeal lies in this particular case and that retrospective effect cannot be given to the new rule. The learned counsel agrees that the value of this suit which was instituted before the new rule was framed, was only Rs. 520.

The question is one of importance, and should be decided by a Division Bench to which I accordingly refer the case.

The judgment of the Division Bench was delivered by

10th May 1907.

LAL CHAND, J.—The facts are given in full in the order referring the case to a Division Bench for decision. The suit is for custody of wife, and, when instituted on 26th October 1905, was valued at Rs. 510 for the purposes of jurisdiction under the rules then in force. It was dismissed under Section 27, Civil Procedure Code, on 6th December 1905, and was readmitted on 4th January 1906. On 19th January 1906 the plaint was returned for amending the names of certain defendants, and the amended plaint was refiled on 22nd January 1906, valuing the suit for purposes of jurisdiction at Rs. 520.

Meanwhile the rule relating to valuation of such suits had been superseded and a new rule fixing valuation such suits at Rs. 1,000 for purposes of jurisdiction was issued with sanction of the Local Government on 4th December 1905.

The question raised is, whether under the circumstances, a further appeal is admissible in the case as of right under Section 40, Punjab Courts Act. We feel obliged to hold that the question must be answered in the negative, with reference to the provisions of Section 12 of the Suits Valuation Act and the provisions of the General Clauses Act of 1897. According to Section 12, nothing in Part I or Part II shall be construed to affect the jurisdiction of any Court—

“(a) with respect to any suit instituted before rules under Part I applicable to the valuation take effect or Part II has come into force, as the case may be, or,

“(b) with respect to any appeal arising out of such “suit.”

The power to frame rules under Part I is given by Section 3 of the Act to the Local Government and by Section 5 (2), under the same part, it is enacted that a rule under that section shall not take effect until the expiration of one month after the rule has been published in the local official Gazette. Reading the latter section with Section 12, it is clear, so far, that a rule for valuation framed under Section 3, Part I, cannot affect either the jurisdiction of a Court or the appeal in any suit instituted before the rule takes effect under Section 5 (2) of the Act.

By Section 7 of the Act, Part II came into force on the 1st day of July 1897, and power to frame rules under this part is conferred by Section 9 on the High Court with the previous sanction of the Local Government. The words used in Section 9 are: “The High Court may, with the previous “sanction of the Local Government, direct that suits of that “class *shall*, for the purposes of the Court Fees Act, 1870, “and of this Act and any other enactment for the time being “in force, be treated as if this subject-matter was of such “value as the High Court thinks fit to specify in this behalf.” The rule relating to valuation in suits for custody of wife was framed by this Court, after securing the necessary sanction under Section 9, and Section 12 by its terms is inapplicable to such rules. The section, so far as Part II is concerned, merely refers to suits instituted before the part came into force and not suits instituted before the rule came into force, as is expressly provided in case of rules framed under Part I. Why this distinction was made is not so obvious. But looking to the language used in Section 9 and the obvious

intention as deducible from the purview of Section 12, it seems reasonable to hold that the rules framed under Section 9, Part II of the Act, were not intended to have retrospective effect so as to affect jurisdiction with respect to an appeal in a suit instituted before the rule came into force. It is true that, speaking generally, an enactment relating to matters of mere procedure is held to have a retrospective effect and to apply to suits or actions already instituted (Maxwell on Interpretation of Statutes, page 339).

But apparently this principle is not now recognised by the Indian Legislature under the General Clauses Act (X of 1897) and was not applied by this Court in *Chaudhri Narsing Das v. Lala Dholan Das* ⁽¹⁾ as is apparent from the following extract from the judgment of the Hon'ble Mr. Justice Chatterji at page 41 :—"The further discussion of the question appears to be concluded by the wording of the New General Clauses Act X of 1897. Clauses (c) and (e) of Section 6 of that Act, and "particularly the latter, seems to save the entire procedure "applicable under the old law, as it expressly provides that "any such investigation, legal proceeding or remedy may "be instituted, continued or enforced as if the repealing Act "or Regulations had not been passed. It would seem that "this section not only saves the rights, liabilities and obligations accrued before the passing of the Act, but also the "procedure to give effect to them, and makes it necessary "when a procedure Act is repealed and a new procedure "substituted to provide how far the new procedure will apply "to proceedings pending at the time or to be instituted thereafter to enforce existing rights and obligations."

The concluding words of Section 6, Act X of 1897, that "any such investigation, legal proceeding or remedy may be "instituted, continued or enforced.....as if the repealing Act "or Regulations had not been passed," make it absolutely clear that the procedure laid down by the repealing Act is not at all intended to have retrospective effect as regards suits instituted under the repealed enactment.

Act X of 1897 doubtless refers by its terms to legislative enactments and not to rules framed under authority conferred by a legislative enactment. But the provisions of the Act may be referred to for guidance in a matter of a similar nature, and having regard to the scope of the provisions of Section 12 of the Suits Valuation Act and the language of Section 9

of the Act as already quoted, it seems to be clear that the rule in question does not, and was not intended to, apply to suits instituted before the rule itself was issued. If the procedure in suits already instituted is not affected by any enactment passed subsequent to such institutions it would seem to follow as a necessary corollary that such procedure is not to be affected by rules framed or issued after such institutions. The suit in the present case was no doubt dismissed for default and readmitted, and the plaint was returned for amendment and was amended after the new rule came into force. But the amendment of the plaint does not affect at least the principal defendant Mussammat Kesri, and against her the suit was certainly instituted on a date prior to the issue of the new rule. As regards readmission after dismissal for default it cannot be treated as changing the date of institution of the suit. It was doubtless open to the plaintiff under Section 99, Civil Procedure Code, to bring a fresh suit, but he elected not to do so, and proceeded after readmission with the suit as originally instituted. The suit must therefore be held as instituted on the date when the plaint was originally filed and not on the date of its readmission. The terms of Section 99 are: "The Court shall pass an order to set aside the dismissal and appoint a day for proceeding with the suit." These terms clearly preclude the suit after readmission being treated as a fresh suit or as instituted on the date of readmission. We, therefore, feel constrained to hold that the new rule passed in supersession of the existing rule is inapplicable, and that the value of the suit for the purposes of the jurisdiction in this case must be held to be below Rs. 1,000 as set out in the plaint.

A further appeal is consequently inadmissible in the case as of right under Section 40 of the Punjab Courts Act.

No. 32.

Before Mr. Justice Lal Chand.

AMIR CHAND AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

CHUNI LAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 342 of 1906.

Custom—Pre-emption—Pre-emption on sale of house property—Kot Nau in Khem Karn, tahsil Kasur, Lahore District.

Found that the custom of pre-emption in respect of sale of house property based on vicinage exist in Kot Nau, a sub-division of the town of Khem Karn, in the Kasur tahsil of the Lahore District.

Further appeal from the decree of A. Kensington, Esquire, Divisional Judge, Lahore Division, dated 19th April 1904.

Ishwar Das, for appellants.

Harsukh Rai, for respondents.

The judgment of the learned Judge was as follows :—

29th Oct. 1906.

LAL CHAND, J.—This is an appeal in a suit for pre-emption of a house in Khem Karn, a small town in Kasur *tahsil* of the Lahore District. According to the census of 1881 it contained a population of five thousand five hundred inhabitants, but according to the Gazetteer the town must at some former time have been a place of larger size and more importance than at present, as there are a number of ruins scattered around beyond its present limits.

It is at present divided into three main sub-divisions designated Kot Kohna, Kot Vichla and Kot Nau. The house in dispute is situate in Kot Nau and plaintiff has sued for pre-emption on the ground that he owns an adjoining house. Defendants-vendees by their written pleas admitted the existence of the custom of pre-emption, as alleged by plaintiff, but asserted their equal or superior right by reason of owning an adjoining building site. This plea accorded with the terms of the sale-deed which describes the sale to the vendees as pre-emptors by reason of owning a site on the eastern boundary. But the plea was recanted by one of the vendees before the issues were fixed as he alleged in his examination that there was no custom of pre-emption either in the town or in the sub-division, and if there was, he had a better right. An issue was accordingly fixed whether the custom of pre-emption prevailed in Kot Nau of the town of Khem Karn. The First Court found the issue in the affirmative and decreed the claim. The Lower Appellate Court has dismissed the suit on the ground that the proof adduced is not adequate to prove the existence of pre-emption. I am unable to agree with the view taken by the Lower Appellate Court, and it appears to me that the evidence produced is sufficiently strong to prove the alleged custom. There are five instances including three decided cases.

In the first instance (*Gaju v. Hukma*) decided on 29th January 1884) an express issue was fixed whether the custom of pre-emption prevailed in Khem Karn. It was found in the affirmative after enquiry and it is noticeable that

according to the judgment the existence of the custom of pre-emption was supported even by the evidence for the defendant.

In the next case *Fateh Din v. Wali Muhammad* decided on 22nd March 1896, the defendant admitted the claim which was accordingly decreed. The third case related to a suit for pre-emption on an auction sale. It was undefended and the claim was decreed *ex parte*. The two remaining cases are instances of successful private assertion of the right of pre-emption deposed to, one by Dina, the successful pre-emptor, and the other by Athar Mal witness. The last case occurred in Kot Vichla or the middle Kot, the first in Kot Kohna or the old Kot and the remaining three cases in Kot Nau where the house claimed in the suit is situate. There are thus three undoubted instances of successful exercise of the right of pre-emption in the sub-division itself supplemented by two instances in the neighbouring sub-divisions. There is no instance to the contrary, and beyond making a general assertion the defendant's witnesses have not even deposed to definite sales which were not pre-empted. On the other hand the existence of the custom of pre-emption was expressly alluded to in the sale-deed itself and was reiterated in the written pleas, signed and verified by the vendees. I am not prepared to pass over these admissions as of no importance or to say that the defendants were badly advised in making them. On the other hand the admission in the sale-deed seems to me to indicate a conscious belief on the part of the vendees that the custom of pre-emption does prevail in the town and the sub-division where the house sold is situate. The counsel for respondents attempted to minimise the effect of these admissions by relying on certain observations in *Dhuni Mal v. Kalu* (1) at page 247, but the remarks quoted apply to a case where the vendees in reply to plaintiff's notice offered to resell a circumstance entirely different from the present case, where it is asserted in the sale-deed itself that the property was sold to the purchaser as he was a pre-emptor. In this respect the following remarks in *Mussammatt Nur Jahan v. Aziz-ud-din* (2) at pages 506 and 507 seem to me to be more appropriate :—

“The binding effect of custom rests upon the consensus of opinion of the members of the community among which it prevails. If the defendants believed that pre-emption attaches

(1) 67 P. R., 1906.

(2) 108 P. R., 1895.

“to the property in dispute or admitted it in Court and “acted on that understanding in arranging for the purchase “of the *tawela*.....it is, I think, a fair inference that the “right is recognised by custom.” It appears that there, as here, the purchaser described himself in the sale-deed as a pre-emptor. The learned Divisional Judge has referred to *Panna Lal v. Bhagwan Das* (1) as showing that much stronger proof is required before a custom of pre-emption by vicinage can be established in what is after all little more than a large country village. According to the Gazetteer the town of Khem Karn is surrounded by a thick well built *pukka* wall buttressed at intervals. The main streets are all paved and it has two or three straight and fairly broad *bazars*. There is a fine *baoli*.....and some well-built houses besides public buildings, such as the Municipal house, the school house and the Police post. Out of a total population of 5,516 according to the census of 1881 the majority, about two-thirds, are Mussalmans. The case reported as *Panna Lal v. Bhagwan Das* (1) related to the town of Bhiwani which was found to be a town of modern origin occupying a large area within the agricultural village of Bhiwani and chiefly inhabited by Marwaris who settled there as traders from various parts of Rajputana.

As regards instances of pre-emption it was there held that the early decisions proceed merely on the accident of vicinage. The case of 1890 which was not appealed against was decided on a principle which has been superseded. So far from there being any reason to suppose that there is a general custom even in a part of Bhiwani, the cases considering the size of the term (with a population between 30,000 and 40,000) and the fact that houses must have very frequently changed hands amongst members of a mercantile community, are surprisingly few in number. This case was therefore evidently decided with reference to its special features, and it is no authority on the question of adequacy of proof to establish the custom of pre-emption. The general observations contained on page 68 evidently refer to the particular faces of the case as is apparent from the circumstance, specially noted, that the house about which the suit had been brought had been twice previously transferred within recent years without any mention of pre-emption right.

In the present case there are no circumstances which would render the existence of pre-emption in Khem Karn as *à priori* improbable. On the other hand the history and constitution of the town with a large preponderance of Muslim population renders it not improbable that custom of pre-emption would be found to exist. There are, moreover, five instances of successful exercise of pre-emption coupled with the vendee's own admission of custom in the sale-deed and in his verified written pleas. And there is absolutely no evidence in rebuttal. There is, therefore, both adequate and cogent evidence in the present case to prove that the custom of pre-emption does prevail in Kot Nau of Khem Karn. I accept the appeal, set aside the decree of the Lower Appellate Court and remand the case for deciding whether defendants-vendees have an equal or superior right as contended in the 6th ground of appeal. The stamp on appeal will be refunded and other costs will be costs in the case.

Appeal allowed.

No 33.

Before Mr. Justice Johnstone and Mr. Justice Shah Din.

INDER SINGH,—(PLAINTIFF),—PETITIONER,

Versus

RAM SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 115 of 1905.

Dismissal of suit for default—Failure of plaintiff to avail himself of the provisions of Section 99—Review of judgment—Civil Procedure Code, 1882, Sections 98, 99, 623.

Held that no review of judgment is admissible under Section 623 of the Code of Civil Procedure of an order dismissing a suit for default under Section 98 where the plaintiff has failed to avail himself of his proper remedies under Section 99 of the Code.

Petition for revision of the order of Captain B. O. Roe, Additional Divisional Judge, Ferozepore Division, dated 22nd December 1904.

Ishwar Das, for petitioner.

Daulat Ram, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The sole question for determination in this case is whether the order passed by Mr. Swift on 14th 11th Decr. 1906.

July 1903 was one to which Section 98, Civil Procedure Code, was applicable or not. After hearing the learned pleader for the petitioner we are of opinion that the said order clearly falls within the perview of Section 98 ; and it follows as a necessary consequence that the order of the 26th July 1903, dismissing the suit under that section was correct. The order of 14th July runs as follows :—

Chunki wakil mudalai urz karta hai ki adalat alia Chief Court (men) appeal kia hua hai, lihaza hukm hua ki muqaddma 26 August 1903 (ko) baintizar-i-hukm adalat-i-alia Chief Court pesh howe. Parcha diya gaya.

We think that the above order is susceptible of one interpretation only, *viz.*, that the Court adjourned the hearing of the suit (pesh howe) to the 26th August 1903, the reason for the adjournment being that the result of the appeal said to be then pending in the Chief Court was to be awaited in order to see if it would have any effect on the progress of the suit. The usual parcha containing the date of the next hearing was given to the parties, the intention clearly being that the parties should appear on that date. Under these circumstances the order of dismissal under Section 98, Civil Procedure Code, was perfectly justified.

We are also of opinion that the learned Divisional Judge was right in holding that the order of the 26th August 1903 was a "judgment" within the meaning of Section 624, Civil Procedure Code, and that the Munsif who succeeded Mr. Swift was, therefore, not competent to review the said order under that section. In any case the petitioner having omitted to avail himself of his proper remedies under Section 99, Civil Procedure Code, the Munsif should not have entertained the application for review under Section 623 of the Code (see *Kailash Mondol v. Nabadwip Chandrakar* ⁽¹⁾).

For the foregoing reasons we uphold the order of the Lower Appellate Court and dismiss this revision. The parties will bear their own costs.

Application dismissed.

No. 34.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

GANPAT RAI AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

KESHO RAM AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 262 of 1906.

Custom—Inheritance—Khatris of Satgharra, Montgomery District—Succession of collaterals in preference to a daughter's son—Hindu Law—Burden of proof.

Held that the plaintiffs upon whom the *onus* lay had failed to establish that in matters of succession the Khatris of Satgharra were governed by custom and not by Hindu Law, or that collaterals were entitled to succeed to the exclusion of a daughter's son.

First appeal from the decree of Lala Ganga Ram, District Judge, Montgomery, dated 30th January 1906.

Sukh Dial and Moti Lal, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—We have heard arguments at great length in this case albeit, for some reason best known to the learned pleaders engaged for the appellant, the argument in reply was allowed to come to an abrupt conclusion. 23rd Oct. 1908.

The case before him is thus stated by the learned District Judge: "The property in dispute belonged to Ganga Ram, who died without male issue, more than 40 years ago, Mussammat Jawala Devi, defendant, is his widow, and Kesho Ram, defendant, is his daughter's son. On the 28th February 1904 Mussammat Jawala Devi executed a gift deed of the property in dispute in favour of Kesho Ram, defendant. The deed was registered on 29th February 1904. The plaintiffs stated that they are the reversionary heirs of Ganga Ram, that Mussammat Jawala Devi was entitled to maintenance only and had no power to make a gift of the property, which was ancestral, in favour of Kesho Ram, defendant. They have brought this suit to have it declared that the alienation in question will not affect their interests after the death of Mussammat Jawala Devi. The defendants contended that they were Khatris, and as high caste Hindu were

"governed by Hindu Law in matters regarding succession, "etc., and that, according to Hindu Law, Kesho Ram, who was "the son of Ganga Ram's daughter, excluded plaintiffs, who "were Ganga Ram's collaterals, from succession to the property "in dispute. It was also contended that there was no custom "whereby collaterals excluded daughter's sons from succession, "and that the gift being in favour of the next heir was valid. "The plaintiffs contended that although they were Khatris, "yet in questions of succession to land they were governed by "custom and not by *Dharm Shaster*."

The only question, however, which is before us for decision, is whether or not the parties are, for purposes of succession to the property in question, governed by Hindu Law or agricultural custom.

Part of the property is agricultural land in various villages of the Montgomery District.

The parties are admittedly high caste Khatris, governed in other matters by Hindu Law, wearing the sacred thread, and in all particulars conducting themselves as high caste Hindus living under their personal law. They live, and have lived, for generations in Satgharra which was once a walled town of some importance and which still retains the characteristics of a town albeit a decayed one. It is quite clear too, and we may dispose of this point at once, on the evidence, that none of the parties are in any sense agriculturists, thereby differing altogether from the parties concerned in the case decided in *Uttam Singh v. Jhanda Singh* (1), who were found on the facts to be agriculturists. Here the evidence is conclusive that the parties are not now, and never have been, agriculturists—they have merely bought land and enjoyed its income.

Upon these premises it is clear, in accordance with an overwhelming consensus of authority, that the *onus* lay very heavily upon the plaintiffs to establish their claim to be governed by agricultural custom as regards succession to agricultural land.

They seek to establish this proposition in three ways.

(1) Entries in the *Wajib-ul-arz* (village administration paper) of the villages in which the lands are situated,

(2) Entries in the *Riwaj-i-am* (statement of tribal customs).

(3) Instances in which collaterals were preferred to daughter or daughter's sons.

The entries in the *Wajib-ul-arz* are undoubtedly in favour of the plaintiff's contention. But in our judgment these entries, while they are to be accepted as evidence, are wholly insufficient to establish the *factum* of the custom set up. They may represent the wishes of those who made them, or they may simply represent the ordinary entry made in the *Wajib-ul-arz* of the villages throughout a district mainly Muhammadan. But they seek to support a custom in defeasance of the rights of persons who were no parties to that declaration, *i. e.*, the female relatives of the signatories, and it is quite clear that no body of men can deprive another set of right-holders under personal law by their mere *ipse dixit* that their custom is different from personal law. No doubt usurpation successfully carried out for a long time may possibly eventually establish a custom, but it is necessary in such a case to show not merely that certain persons desire such and such to be the custom to the detriment of the rights of others, but that such and such have really become a binding custom fully established and followed. But as remarked by Clark C. J., and Reid, J., in *Maula Bakhsh v. Muhammad Bakhsh* (1), and *Har Narain v. Mussammatt Deoki* (2), it is the clear duty of the Courts to watch with very special care over the rights and interest of the weak as against the strong, and in particular to see that the rights of the weaker sex are not sacrificed to a desire on the part of the "agnate" to take advantage of customs obtaining around him which are more favourable to himself and his sex. We think in this case that the value of the entries in the *Wajib-ul-arz* is not great, being discounted by the other facts of the case, and that they are of quite insufficient weight to override the rights of females under their personal law, and the strong presumption that there is in the other direction.

These remarks also apply to the entries in the *Riwaj-i-am* in regard to which it is further to be noted that the officer responsible for it, Mr. Purser, one of the ablest and most reliable Revenue Officers of the Punjab, distinctly warns us not to trust it, especially in regard to questions such as the present.

Having reached this point, we must examine into the question is the custom established *aliunde*?

(1) 54 P. R., 1906.

(2) 24 P. R., 1893.

We have examined very carefully into the so-called instances quoted.

It is quite clear that all the instances of any value are not merely compatible with Hindu Law, but were actually instances in which it was followed. The parties being high caste Hindus, the presumption in each case was that there was a joint Hindu family. No evidence to the contrary has been given in any one of the cases, but in several there is direct evidence of jointness, and the successions are precisely what would take place in a Hindu family under Hindu Law. Looking at the whole of the instances given in support of the plaintiff's case, it is quite clear that these are totally insufficient to establish the custom set up.

One other point requires mention.

It appears that in 1899 the widow, Jawala Devi, made a gift to Kesho Das and got the collaterals to recite their consent. This, it is contended, was an admission of the existence of the custom set up.

It may have been, but even if so, the admission by the widow on a misapprehension of the law would not be very important, and it may have well been nothing more than a wise precaution.

We do not look upon its value as great—but as stress was laid upon it by the appellant, it is as well to mention it.

Having found that the plaintiff has quite failed to establish his case, it is unnecessary to labour through the instances quoted for the defendants. Two or three at least appear to be of value. We find that the parties are governed by Hindu Law in regard to succession to the property in dispute.

The appeal fails and is rejected with costs throughout.

Appeal dismissed.

No. 35.

Before Sir William Clark, Kt., Chief Judge.

BHOLI,—(PLAINTIFF),—APPELLANT,

Versus

KAHNA AND OTHERS,—(DEFENDANTS,)—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1280 of 1903.

*Custom—Inheritance—Dogars of Amritsar District—Sister succeeds to acquired property in preference to collaterals of the sixth degree.**Found that by custom among Dogars of the Amritsar District a sister is entitled to inherit acquired landed property in preference to collaterals of the sixth degree.**Further appeal from the decree of A. E. Hurry, Esquire, Additional Divisional Judge, Amritsar Division, dated 24th January 1908.*

Fazl-i-Hussain, for appellant.

Miran Bakhsh, for respondents.

The judgment of the learned Chief Judge was as follows :—

CLARK, C. J.—The property in dispute was admittedly *2nd Decr. 1908.* acquired by Ladhu.

The question is whether a sister or collateral not nearer than the sixth degree to the deceased succeed to his acquired property.

The parties undoubtedly follow custom, not Muhammadan Law.

In the case of daughter, Section 23, Rattigan's Digest, gives the preference to daughters over collaterals as regards acquired property. Section 24 says that sisters are usually excluded. This seems rather broadly stated and hardly warranted by the authorities quoted for and against. No distinction is referred to between ancestral and acquired property such as is made in the case of daughters.

The instances quoted where sisters were excluded were all instances, where the collateral excluding was nearer than the sixth degree. On the other hand there are many instances quoted where the sisters excluded collaterals within the sixth degree.

Taking into consideration that by Muhammadan Law sisters would exclude collaterals—that daughters exclude

collaterals as regards acquired property. The *onus*, I think, should be put on defendants to prove that they exclude plaintiff.

The fact that a proprietor can dispose of his acquired property and presumably would prefer to transfer it to his sister rather than to a remote collateral, who lived in another village, practically a stranger, is also in plaintiff's favour.

The Divisional Judge did not analyse the value of Section 24 of Rattigan's Digest with reference to the facts of this case, and the *Riwaj-i-am* of Jullundur, which he quotes in favour of defendants, is balanced by the *Riwaj-i-am* of Lahore, where, among Dogars, sisters exclude collaterals beyond the fifth generation.

I come to the conclusion that the custom of the Dogars of Amritsar is that as regards acquired property sisters exclude collaterals of the sixth degree. I accept the appeal and set aside the orders of the Lower Court and decree possession of the land claimed.

As the custom is by no means well defined, I leave the parties to bear their own costs throughout.

Appeal allowed.

No 36.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

MUKERJI,—(PLAINTIFF),—APPELLANT,

Versus

ALFRED AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 373 of 1907.

Native Christian—Hindu convert to Christianity—Rule of succession—Hindu Law or Indian Succession Act, 1865—Evidence of custom—Justice, equity and good conscience—Partition of joint immovable property—Authority of Courts to give money decree in lieu of share—Partition Act, 1893.

Held that the rule of law to regulate succession in the case of a Hindu convert to Christianity should be determined by ascertaining the course of his conduct and the usages adhered to by him since his conversion, and therefore where it appeared that he and his family had severed all connection with Hindu society and in matters relating to social intercourse, marriages and the similar usages, abandoned all caste distinc-

APPELLATE SIDE. }

tions and had thoroughly identified themselves with the members of the religion of their adoption, it is in accordance with justice, equity and good conscience to apply to them the rules of inheritance prescribed by the Indian Succession Act, 1865.

Held, also, that in a suit for partition of joint immovable property the Court has no authority, in the absence of an application under Act III of 1893, to grant a mere money decree in lieu of a definite share to the claimant.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Lahore Division, dated 20th December 1906.

Muhammad Shafi, for appellant.

Sangam Lal, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—The parties to this appeal and cross-appeal 14th June 1907. No. 374 of 1907 are the lineal descendants of Fakir Chand Alfred, a Bengali Hindu convert to Christianity, who died in November 1888. The plaintiff-appellant, Mrs. Mukerji, is his daughter. Defendants Nos. 1 and 2, George and Henry Alfred, respectively, are his sons, and defendant No. 3, Frederick Pearce, is his grandson by his predeceased daughter, Mrs. Katherine Pearce. He also left him surviving a third son, E. C. Alfred, who died in June 1899. The present suit was instituted by the plaintiff-appellant on 9th January 1902, for one-fourth share in the estate left by her father on an allegation that the parties being Christians the plaintiff was entitled to receive the share as claimed under the Indian Succession Act. It was alleged in the plaint that the estate left by Fakir Chand consisted of two houses and a business styled George Alfred and Co., which included a medical shop, a press and a soda-water factory; that the plaintiff was a minor when her father died in 1888; that she was maintained and educated by her brothers with whom she lived until her marriage in December 1897; that the plaintiff attained her majority in 1899, when she demanded her share and was refused, and hence the suit for her legal and proper share in the property.

The claim was resisted solely by defendant, George Alfred, who pleaded that the business styled George Alfred and Co. belonged to him exclusively; that the Indian Succession Act was inapplicable, and that by family customs plaintiff as a daughter was not entitled to receive any share in the estate

left by Fakir Chand. He also pleaded having improved the property at much personal expense and trouble for which he claimed compensation in case a share were awarded to plaintiff.

Defendant No. 2, Henry Alfred, did not file any defence, but examined as a witness for the plaintiff, he supported her case and asserted that the whole property in dispute belonged to Fakir Chand; that he, defendant 2, was entitled to an equal share under the Succession Act, but that he had received the press and certain lands as equivalent of his share in the shop, the house property still remaining joint. No defence was filed by defendant No. 3, the grandson of Fakir Chand by Katherine Pearce, the predeceased daughter. But examined as a party he declared that he did not want a share, that the whole property in suit was owned by Fakir Chand whose heirs were, he stated, his two sons, defendants Nos. 1 and 2, and his daughter, the plaintiff in the case.

Several issues were fixed including a preliminary issue as to whether the parties were not governed by the Indian Succession Act. The Subordinate Judge after enquiry held that the parties were governed by the Indian Succession Act; that no custom to the contrary was proved; that the whole of the property in dispute, including the firm named George Alfred and Co., belonged to Fakir Chand; that the plaintiff was entitled to receive one-fifth share in the whole property, but that it was inexpedient and inequitable to divide the business, which had hitherto been carried on by the sole exertions of defendant No. 1 who had further specially qualified himself for the business, and after deducting debt due by the estate the Sub-Judge passed a money decree for Rs. 2,253 with costs in proportion against the defendants on the security of the whole estate in dispute.

This decree was not appealed against by defendants Nos. 2 and 3, but the plaintiff and defendant filed cross-appeals, the latter for the total dismissal of the claim and the former *inter alia* for a decree being passed for possession by partition of the share as claimed in lieu of the money decree passed by the Subordinate Judge.

The Divisional Judge, Mr. Martineau, held on defendant's appeal that the parties were governed by the Indian Succession Act, and that the Hindu custom of inheritance was inadmissible, but he found on the merits of the dispute that the firm styled George Alfred and Co. belonged exclusively to defendant No. 1,

and in consequence he remanded certain issues for enquiry as to the amount of rent received and as to costs of improvements effected by defendant No. 1, and expenses incurred by him on plaintiff's maintenance, education and marriage and on the maintenance of his deceased brother E. C. Alfred. On receipt of the return the appeals were heard by the Additional Divisional Judge, Captain Irvine, who declined to re-open the whole matter as desired by the pleader for the plaintiff and, as a result of the further enquiry, reduced the decree in plaintiff's favour to Rs. 2,052, thereby accepting the defendant's appeal in part and dismissing the plaintiff's appeal in its entirety. The same parties have now filed cross-appeals, and cross-objections were also filed on behalf of defendants Nos. 2 and 3. The last we overruled at the hearing on the ground that defendants Nos. 2 and 3 having accepted the decree of the First Court, and not having appealed against the said decree or filed cross-objections there against, were incompetent to file cross-objections in this Court, the result of the decree passed by the Lower Appellate Court being not to increase but to reduce the decree passed by the First Court in plaintiff's favour.

It was contended by their counsel on the authority of *Wasdeo v. Rup Chand* (1), that the suit being for partition of movable and immovable property, the decree passed in plaintiff's favour by the First Court was equally a decree in favour of their clients. But this argument is altogether fallacious and the authority quoted is wholly inapplicable. No decree for partition of the property in suit was passed in this case by the First Court, but the Court awarded a mere money decree in favour of plaintiff's favour. The applicants, therefore, are not entitled to treat the aforesaid decree as for an equivalent sum in their own favour, and as a matter of fact defendant No. 3 had deposed in the First Court that he had no share, and defendant No. 2 that he had received his share in the shop and was a co-sharer in the house property only.

For defendant No. 1 it was contended on his appeal as a preliminary matter that the Indian Succession Act was inapplicable; that Section 5 (c), Punjab Laws Act, was also inapplicable as the parties were neither Hindus nor Muhammadans; that Section 6 of the Act was consequently applicable, and that under the circumstances the rule of decision should be according to justice, equity and good conscience, which it was contended on the authority of *Raj Bahadur v. Bishen Dayal* (2), ought to be the provisions of the Hindu Law in the

(1) 23 P.R., 1905.

(2) I. L. R., IV All., 343.

present case, as the father of the parties was by birth a Hindu governed by Hindu Law. The provisions of Act XXI of 1850 were further referred to in argument showing that despite a change of religion by Fakir Chand, his children were not deprived of the benefit of Hindu Law, and *Gulab v. Ishar Kour* ⁽¹⁾, *Bhagwant Singh v. Kallu* ⁽²⁾, an unreported judgment in C. A. No. 1413 of 1890 and *Roda v. Harnam Singh* ⁽³⁾, were quoted to support the contention. The contention was opposed by the other side on the ground that it was not contained in the grounds of appeal, an objection which we overruled and on the merits of the contention it was argued for the plaintiff that Fakir Chand acquired the property in dispute after his conversion; that Act XXI of 1850 was therefore inapplicable, and that it was incompatible with equity and good conscience to deprive the plaintiff of her share in the inheritance.

After giving our best consideration to the arguments on both sides we are unable to give effect to the legal contention raised on behalf of the defendant-appellant.

To start with Act XXI of 1850 is wholly inapplicable to the present case. As explained by its preamble the plain object of the Act is not to confer on any party the benefit of the provisions of Hindu or Muhammadan Laws, but not to permit the provisions of such laws to deprive any party or parties of any property which, but for the operation of such laws, they would be entitled to receive. In other words, the Act repeals and abrogates so much of the provisions of these laws as by reason of change of religion deprives any party from continuing to hold property held before conversion or from succeeding to property as an heir after conversion. This is what is expressly enacted in Section 1 of the Act, and the section leaves entirely untouched the question, which is the essential question in the present case, *viz.*, what rule of law is applicable to regulate succession after conversion. This rule of law may be Hindu Law, if adhered to despite conversion, but if so, it would be minus the rule which causes forfeiture or excludes from inheritance by reason of change of religion. Or the rule of law might be as contained in some positive enactment of the Legislature. But these are matters altogether beside the scope of Act XXI of 1850 which is hence altogether inapplicable to the point under discussion.

The rule of law applicable to the present dispute must therefore be ascertained elsewhere and otherwise. The two enactments which regulate matters of succession in this Province are

⁽¹⁾ 63 P. R., 1895.

⁽²⁾ I. L. R., XI All., 100.

⁽³⁾ 102 P. R., 1902.

Act X of 1865 and Act IV of 1872, clause A, Section 5 of the latter Act assuming it equally applies to Native Christians, is obviously of no avail in the present case as no family custom is admittedly proved, and moreover Fakir Chand had migrated to the Province from Bengal, and it is extremely unlikely that he adopted any local custom during his sojourn in the Province as a Government servant.

Clause (b) was admitted to be inapplicable as the parties are not Hindus.

Section 6 of the Punjab Laws Act applies the rule of justice, equity and good conscience to cases "not otherwise specially provided for."

On the other hand Section 2, Indian Succession Act, lays down that the rules contained in the Act shall constitute the law of British India applicable to all cases of Intestate or Testamentary succession, "except as provided by this Act or by any other law for the time being in force." Reading these two enactments together the obvious conclusion is, that in the case of Christians whether by conversion or otherwise in matters relating to succession whether Intestate or Testamentary in the absence of any custom as provided for by Section 5 (a), Act IV of 1872, if it is applicable at all, the rule of law applicable is as provided for in the Indian Succession Act, X of 1865. The matter is absolutely clear in the case of a Christian who or whose ancestor was not a convert Hindu or Muhammadan. In the case of a Hindu convert to Christianity there exists the possibility that despite a change in religion a change of Law may not take place. As observed by their Lordships of Privy Council in *Abraham v. Abraham* (1), "Upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound by his renounced old religion, or if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion."

Whatever difficulties might surround this question in other Provinces owing to the absolute provision of the Succession Act none apparently exist in the Punjab as Section 2 of the Succession Act allows an exception in favour of rules other than those therein contained and under Section 5 of Act IV of 1872, custom, if proved, is the first rule of decision irrespective of all considerations of nationality and religion. The view taken in *Dagree v. Pacotti San Jas* (2), followed by the learned Divisional Judge, that custom contrary to the

(1) 9 M. I. A. 195.

(2) I. L. R., XIX Bom., 783.

provisions of the Succession Act is inadmissible is therefore apparently inapplicable to this Province. It was evidently open in the present case for defendant No. 1 to prove under Section 5 (a), Act IV of 1872, that by custom applicable to the parties daughters were excluded from succession by sons, and sisters by brothers. He could prove this custom by showing that despite a change in religion the usage under Hindu Law in favour of exclusion of daughters was still adhered to. Even if the rule of justice, equity and good conscience laid down in Section 6 of the Punjab Laws Act were to be applied as was contended, it would be necessary to ascertain the course of conduct of the parties and the usages adhered to by them after conversion. This view is directly supported by the following question from the judgment of their Lordships of the Privy Council in *Abraham v. Abraham* :—

“They think, therefore, that this case fell to be decided “according to the Regulation which prescribes that the decision “shall be according to equity and good conscience. Applying, “then, this rule to the decision of the case, it seems to their “Lordships that the course which appears to have been pursued “in India in these cases, and to have been adopted in the present “case, of referring the decision to the usages of the class to “which the convert may have attached himself, and of the “family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of “Christianity releases the convert from the trammels of the “Hindu Law, but it does not of necessity involve any change “of the rights or relatives of the convert in matters with which “Christianity has no concern, such as his rights and interest “in, and his powers over, property. The convert, though not “bound as to such matters, either by the Hindu Law or by any “positive law, may by his course of conduct after his conversion, “have shown by what law he intended to be governed as to “these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted “upon some particular law, or by having himself observed some “family usage or custom; and nothing can surely be more just “than that the rights and interest in his property, and his powers “over it, should be governed by the law which he has adopted “or the rules which he has observed.” The Indian Succession Act was not in force at the time when this judgment was delivered. That fact may probably account for the observation in the judgment, “The convert, though not bound as to such “matters either by the Hindu Law or by any other positive law.”

Moreover the point in dispute in the case was the question of parcenership and not of succession, and as recently pointed out in *Ghosal v. Ghosal* (1), "the Indian Succession Act does not affect the rights of co-parcenership as between those to whom it applies." It is clear, however, that the test prescribed by their Lordships for applying the rule of equity and good conscience is to ascertain the course of conduct and the usage adhered to since conversion. In the present case there is absolutely no proof, that after his conversion Fakir Chand continued to attach himself to Hindu society or to observe Hindu usages. On the other hand there are clear indications on the record that the family, since its conversion, had severed all connection with Hindu society and in matters relating to social intercourse, marriages and the similar usages, abandoned all caste distinction and had thoroughly identified themselves with the members of the religion of their adoption. The circumstances found to exist in *Raj Bahadur v. Bishen Dayal* (2) quoted for the defendant-appellant were entirely different. It was there found that the family, Hindu by its origin, had not definitely accepted Islam as their religion and were found to occupy a *terram mediam* betwixt Hinduism and Muhammadanism. It was further found that the majority of Hindu usages, including observing of Hindu holidays and Hindu Law of inheritance, had always been followed in the family. The authority quoted is therefore entirely inapplicable to the present case where the facts are just the reverse.

Assuming, therefore, that Act IV of 1872 is applicable to Native Christians, there is no proof here of custom under Section 5 (a), and in view of the facts already alluded to the provisions of Hindu Law are inadmissible to afford the rule of equity and good conscience under Section 6. The mutation proceedings on the death of Fakir Chand are altogether inconclusive if relevant at all to show that the parties intended to follow Hindu Law in questions relating to inheritance. Under the circumstances we are decisively of opinion that the rule of inheritance as prescribed by the Indian Succession Act, governs the parties in the present case, and that plaintiff under Section 33 of the said Act is entitled to claim and receive one-fourth share in the estate left by her deceased father Alfred Fakir Chand. The question then is, what was the estate left by Fakir Chand? There is no dispute that the two houses in suit formed part of his estate. The only disputed matter is the ownership of the business styled

(1) *I. L. R.*, XXXI Bom., 25.(2) *I. L. R.*, IV All., 343.

George Alfred & Co. Defendant No. 1 claimed it to be his exclusive property, while plaintiff and other members of the family asserted that it was owned by Fakir Chand, and is part of his estate. After hearing lengthy and elaborate arguments on both sides we are of opinion that the view taken by the Subordinate Judge, *viz.*, that the business did not belong exclusively to defendant No. 1 was maintained, and that the Divisional Judge was not justified in taking a contrary view. The learned Divisional Judge has differed from the finding of the subordinate Judge simply on the basis of an old ledger "which contains an account of different customers of the firm and among them is the account of Fakir Chand Alfred himself for medicines and other articles supplied to him from the shop." "If Fakir Chand", the Divisional Judge holds, "was the proprietor of the firm, it is difficult to understand how a regular account came to be opened in the books of the firm for articles supplied to him from the shop, while it is almost impossible to explain the fact of his being credited on that account with the amount due to him for house rent." The house in which the business was conducted admittedly belonged to Fakir Chand, and hence even as a partner he would be credited with rent of the premises. And as regards a separate account being opened in the ledger for Fakir Chand, it is in no way incompatible with his being a partner in the firm. In fact, as is the universal practice, similar accounts were opened in the ledger in the names of the other partners from time to time, *viz.*, Carey & Co. and Doctor Muhammad Ali. The single reason therefore given by the learned Divisional Judge for differing from the Subordinate Judge has no force, and on his own findings he might have otherwise accepted the finding of the First Court on the question of ownership of the shops. The Additional Divisional Judge on receipt of the return was inclined to take the same view as had been taken by the Subordinate Judge, but felt himself bound by the finding of his predecessor. It is true that the original deed of partnership, dated 11th December 1874, represents George Alfred, defendant No. 1, as the partner, and not Fakir Chand, his father. It is also probable that the account book containing a distribution of the profits up to 1888, which was admittedly received by defendant No. 2, who throughout has sided with the plaintiff, was not returned by him to defendant No. 1 as alleged. There is therefore a natural presumption that the account book, if produced, would have supported the plea taken by defendant No. 1. But it is unnecessary to decide, whether the business was started with money owned by defendant No. 1, who was then a minor

and by his mother as alleged by him, or whether the funds were supplied by Fakir Chand for his own benefit or for the benefit of defendant No. 1. For there is no room for doubt that at least since the death of Fakir Chand the business have been managed and admitted on several occasions as owned by the whole family and not exclusively by defendant No. 1. This is rendered clear by the statements relating to income tax contained in the Despatch Register, which we hold are so far relevant by the description given in the Lahore Directory which was presumably supplied by defendant No. 1, and finally by the description contained in the mortgage deeds executed at various times for raising loans partly for the business on the security of the house property. Apart from the oral evidence, which may be partisan or not quite disinterested, the accumulative effect of the documentary evidence strongly supports the view that at least since Fakir Chand's death the business has been conducted and treated as family property. Under the circumstances the view taken by the learned Subordinate Judge was justifiable and maintainable, and we uphold it accordingly. On this finding it is unnecessary to decide the various details as regards income and expenditure, argued on defendant's appeal, which accordingly fails entirely. We further agree with the Subordinate Judge that the estate including the business was managed by defendant No. 1 to the best advantage of the proprietors including himself, and that the debts incurred were incurred *bono fide* and for the benefit of the family and of the estate. It is unnecessary, therefore, to take account as asked for in the plaint. Nor does it appear to be feasible to do so as the defendant apparently with good reason accuses defendant No. 2, his brother, with having removed some of the books, and the whole concern was evidently managed more as if the parties were parceners rather than as partners. Moreover the counsel for the plaintiff did not insist that accounts should necessarily be gone into, and he left the matter solely at the discretion of the Court. Under the circumstances we agree with the Subordinate Judge that the business should not be sold up or dissolved, but that plaintiff should be given a decree for one-fourth share of the value of the stock as valued by experts appointed by the Subordinate Judge, *viz.*, one-fourth of Rs. 7,012 = 1,753.

As regards the houses the plaintiff is entitled to recover her one-fourth share by partition. There is no real authority to support the discretion exercised by the Subordinate Judge in passing a mere money decree in lieu of possession by partition as claimed in the plaint. The authority quoted by the pleader for the

defendant, viz, *Ashanullah v. Kali Kinker* ⁽¹⁾ contains a mere *obiter dictum*, and is inapplicable. The decision was moreover given before Act IV of 1893 was passed. The matter must now be regulated in accordance with the provisions of the said Act. There is absolutely no law or authority now in force to justify a money decree being passed independently of its provisions in a suit for partition. If it were still discretionary and justifiable to do so, regardless of the provisions of the Partition Act, the enactment would be rendered useless and unnecessary, and its provisions would, in fact, be reduced to a mere dead letter. We therefore hold that the plaintiff is entitled to insist on a partition of the house property in the absence of any application to take action under the provisions of the Partition Act. We accept plaintiff's appeal and pass a decree in her favour for possession of one-fourth share by partition of the two houses in dispute, subject to joint responsibility for mortgages in favour of Mathra Das and Nanak Chand for Rs. 3,000 and 5,000, respectively. As regards the firm styled George Alfred and Co., which includes the press and the soda water factory, plaintiff's claim for taking accounts is hereby dismissed, and in lieu of her share in the firm we award in her favour a money decree for Rs. 1,753 against the defendants on the security of the estate in dispute. The appeal and cross-objections filed by the defendants are dismissed. But considering the nature of the dispute and the circumstances attending it we think it shall be fair and equitable to direct that the parties bear their own costs throughout, and we direct accordingly.

Appeal dismissed.

No. 37.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

APPELLATE SIDE.

SHAM LAL AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

JOHRI MAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 617 of 1905.

Benami transaction—Benami mortgage—Assignment by benamidar—Right of beneficiary against the property and the benamidar—Limitation—Limitation Act, 1877, Schedule II, Article 132.

Held that a person who takes a mortgage of immovable property in the name of another, loses his lien on the security, if a *bonâ fide* trans-

(1) *I. L. R., X Cal., 675.*

feree acquires it for value from the *benamidar*, but has a remedy against the latter for the money wrongfully received and retained by him and it being charged on immovable property the limitation for such a claim is that which is provided by Article 132 of the second Schedule to the Indian Limitation Act, 1877.

Further appeal from the decree of W. A. LeRossignol, Esquire, Additional Divisional Judge, Delhi Division, dated 6th March 1905.

Shadi Lal, for appellants.

K. C. Chatterji and Muhammad Shafi, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—This is a suit for Rs. 1,700 on the 13th Feby. 1907; basis of a mortgage-deed, dated 7th June 1895, executed by Gopal, defendant, for Rs. 1,000 in favour of Johri Mal and Ramji Das, defendants. The plaintiff-appellant alleges that he supplied the mortgage-money and is the real beneficiary under the mortgage-deed, which he states was executed as a *benami* transaction in favour of Johri Mal and Ramji Das, defendants. According to the mortgage-deed, Rs. 940 were retained by the mortgagees to redeem prior mortgages in favour of Pyare Lal and Chamman, and Rs. 60 were admitted as received before the Sub-Registrar. The prior mortgages were redeemed by payments made in December 1895 and January 1896, and it is a disputed matter between the parties whether the redemption money was paid by the alleged *benamidars* or by plaintiff-appellant. The mortgagor, however, continued to hold possession, and in 1898 he sold the mortgaged house to one Ram Parshad for Rs. 1,200, who shortly after transferred his purchase for the same price to Jagan Nath, defendant. The plaintiff further alleges that his mortgage-deed was stolen by the defendants in May 1898, and that an endorsement purporting to redeem the mortgage was entered in the deed without his knowledge and consent. Hence he sues for Rs. 1,700 including interest due under the mortgage-deed against defendants with or without lien on the mortgaged property, alleging that he became aware in February 1902 of the fictitious and fraudulent entry on the mortgage-deed acknowledging receipt of money.

The issues fixed by the First Court were :—

- (1) whether the mortgage was *benami* as alleged ;
- (2) whether defendants Jagan Nath and Ram Parshad, the subsequent vendees, had notice that the mortgage was *benami*; and
- (3) if not, whether the suit was within limitation.

The Court held that the transaction was *benami*; but that the subsequent vendees had no notice of its being *benami*, and on these findings decreed the claim for Rs. 1,700 against defendants 1 and 2, the alleged *benamidars* without deciding the issue relating to bar by limitation.

The Divisional Judge on appeal by defendants 1 and 2 has reversed the finding of the first Court on the first issue and dismissed the suit *in toto*.

Plaintiff now appeals contending that the mortgage is *benami* as held by the First Court. It was contended for the respondent at the hearing that the suit is barred by limitation and the following authorities: viz., *Thakur Prasad v. Partab* (1), *Arunachala Pillai v. Ramasamy Pillai* (2), *Banoo Tewary v. Doona Tewary* (3), *Kundun Lal v. Bansi Dhar* (4), *Vishnu Bhikaji Phadke v. Achut Jagan Nath Ghate* (5), *Sriramula v. Chinna Venkatasami* (6), *Ram Kishan v. Bhawani Das* (7), *Sundar Lal v. Fakir Chand* (8) and *Raghumoni Audhikary v. Nilmoni Singh Deo* (9), were quoted to support the contention. None of these, however, seems to be applicable to the present case. Nos. 1, 2 and 3 were cases of realisation of joint property by one co-sharer. No. 4 was a similar case between co-heirs. No. 5 was a case of refund claimed under Section 295, Civil Procedure Code. No. 6 was a suit against an assignor of mortgage rights by an unregistered agreement. No. 7 was similar to No. 5. No. 8 was a suit for money received on a bond by the *benamidar* against the *benamidar* and his transferee, and it was held as barred under Article 62, and No. 9 was a suit for money due to plaintiff, but received fraudulently by defendant and was held as governed by Article 60, Act XI of 1871, which corresponded with Article 62 of the present Limitation Act. It is thus clear that the cases Nos. 8 and 9 above have an apparent application to the present suit, but in neither of these cases, the money was due on a mortgage-deed as here. For appellant it was contended in reply that the article applicable is 132 and not 62, and his counsel relied upon *Berhamdeo*

(1) *I. L. R.*, VI All., 448.

(2) *I. L. R.*, VI Mad., 402.

(3) *I. L. R.*, XXIV Cal., 800.

(4) *I. L. R.*, III All., 170.

(5) *I. L. R.*, XV Bom., 438.

(6) *I. L. R.*, XXV Mad., 396.

(7) *I. L. R.*, I All., 333.

(8) *I. L. R.*, XXV All., 62.

(9) *I. L. R.*, II Cal., 393.

Pershad v. Tara Chand ⁽¹⁾, *Kamala Kant Sen v. Abul Barkat* ⁽²⁾, and *Nund Lal Bose v. Meer Aboo Mahomed* ⁽³⁾, to support the contention.

We think that the principles laid down in these cases are applicable to the present suit. *Kamala Kant Sen v. Abul Barkat* ⁽²⁾ was a case where mortgaged property was sold at auction for arrears of Government revenue, and the surplus proceeds were received by an assignee of the mortgagor. He was sued by the mortgagee for recovering the surplus sale-proceeds as part of the mortgage assets. It was contended for defendant that the suit was barred by limitation under Article 62. This contention was overruled and Article 132 was held applicable on the ground that the lien which existed on the property as a charge was transferred under Section 73, Transfer of Property Act, to the purchase-money, and that there was nothing in the Limitation Act, which would shorten the time within which the plaintiff could sue to recover the money, the suit being a suit not on the personal covenant but a suit to recover the money as charged on the mortgaged property. *Berhamdeo Pershad v. Tara Chand* ⁽¹⁾ was a similar case with this important difference that the sale under which the proceeds were realised by the defendant was not a sale for arrears of Government revenue but in execution of his mortgaged decree, and the proceeds were withdrawn by him, in satisfaction of another decree based on a mortgage subsequent to plaintiffs. It was contended for defendant that the claim was for money had and received by defendant for plaintiff's use, and as such was barred by limitation under Article 62. It was decided by a majority that the article applicable was 132 and not 62, and that the suit was not barred. It was held that the plaintiff's lien continued to be attached to the sale-proceeds, which formed a portion of plaintiff's security for satisfaction of his mortgage, and that such lien was not extinguished by the sale, nor was his right to follow the money or the nature of the suit to enforce such right affected by the fact that the money had been withdrawn from Court by a person having notice of the plaintiff's right. In the present case the house in dispute was transferred by private sale to defendants 4 and 5, who have paid the mortgage-money to defendants 1 and 2, the *benamidars*. The security can no longer be enforced under the circumstance against the house in the hands

⁽¹⁾ *I. L. R.*, XXXIII *Calc.*, 92. ⁽²⁾ *I. L. R.*, XXVII *Calc.*, 180.

⁽³⁾ *I. L. R.*, V *Calc.*, 597.

of defendants 4 and 5 who are found to be *bond fide* transferees. But the money received and retained by defendants 1 and 2 is the mortgage-money. It represents an equivalent of plaintiff's charge on the property and can be followed as such in the hands of the person alleged to be wrongfully withholding the same. The suit is in effect therefore to enforce payment of money charged on immovable property and as such governed by Article 132. It is not a suit to enforce a personal claim, and therefore the cases *Ram Din v. Kalka Prasad* ⁽¹⁾ and *Devi Das v. Ishar Das* ⁽²⁾ quoted for respondent, are inapplicable. In fact plaintiff has no personal claim against defendants 1 and 2. He does not sue them for a personal debt. What plaintiff claims is that the security realised ought to be paid over to him. Such suit is governed by Article 132. If not, then by Article 120, and the suit is within time whichever article is held to apply as it was instituted within six years of the admitted receipt of money by defendants 1 and 2. No authority was quoted where Article 62 was held to apply to a claim for money charged on immovable property, and apparently it would be inequitable and unjustifiable to hold that defendants by receiving the money in 1893 unlawfully as alleged cut short the period of limitation within which plaintiff would otherwise be entitled to enforce payment charged on immovable property as he is now actually suing.

The scope of Article 62 seems to me rather to extend the period of limitation in money claims by giving a further period of three years from the date of receipt, but any how it has to be construed strictly, and cannot be interpreted as shortening the period due on the original cause of action. We therefore hold that the suit is not barred by limitation as contended for the respondent. On the merits of the appeal, we are disposed to agree with the First Court that the mortgage sued upon is a *benami* transaction, and that plaintiff-appellant is the real beneficiary. As pointed out in *Bura Mal v. Bhagwan Das* ⁽³⁾, the criterion in the case of a *benami* transaction in India is to consider from what source the consideration money came. "This is a very important fact in many, it may be said in most cases of alleged *benami*, though it is not the only criterion" (*Ram Narain v. Mohammad Hadi* ⁽⁴⁾). The *onus* no doubt lay on the plaintiff to prove that the mortgage was executed *benami* in favour of

⁽¹⁾ I. L. R., VII All., 502.

⁽²⁾ 55 P. R., 1894.

⁽³⁾ 61 P. R., 1889.

⁽⁴⁾ I. L. R., XXVI Cal., 227, P.C.

defendants 1 and 2 (*Karim-ud-din v. Hardhyan Singh* (1)), but we think he has sufficiently discharged the *onus* in the present case. No adequate explanation is given why the mortgage-deed was executed *benami* in the name of the defendants, but on the other hand the parties are not related, and there is no suggestion in the case that if the money was supplied by the plaintiff, he supplied it for the benefit of the defendants. In fact defendants alleged that they paid the mortgage-money and not the plaintiff. The real question for decision therefore under the circumstances is, who paid the consideration money for the mortgage in dispute. According to the terms of the mortgage-deed as stated already, only Rs. 60 out of the consideration money were paid when the mortgage-deed was executed. This sum was paid before the Sub-Registrar by Hira Lal, writer of the deed, as agent of the mortgagees, and Hira Lal has deposed that the money was paid to him by plaintiff Bhullan Singh and not by the defendants 1 and 2, who apparently took no part in getting the deed executed and registered. The balance Rs. 940 was retained for payment to prior mortgagees, and it is proved beyond all doubt, by reliable evidence, that the whole amount was paid by plaintiff. The receipts for the amount paid to previous mortgagees were held by plaintiff, who filed them in a previous suit, relating to this property, and the previous mortgagee, Chamman, and Lala Devi Dial, *mukhtar*, who paid the money in satisfaction of Piyare Lal's decree, have both deposed that the money was paid by plaintiff. It further appears that a bond given at the same time by Gopal for the balance due to Piyare Lal is attested by plaintiff. The defendants thus do not appear to have taken any part in redeeming the prior mortgages and in making payments. There is no good reason for discrediting the evidence supported as it is by documents, while the defendants, when examined as witnesses, were unable to give any satisfactory account of payment and have to admit that the payments were not entered in their books. On the other hand, there is an entry showing that only two days prior to the deposit with Lala Devi Dial, on 16th December 1895, plaintiff borrowed Rs. 300 from defendants 1 and 2, on pledge of ornaments, apparently for payment to Piyare Lal, the prior mortgagee, and defendants have already received their money from plaintiff by suit. There is thus sufficient explanation how plaintiff through a *chaprasi* raised part of the money for payment to prior mortgagees, while the defendants have given no explanation whatever for their complacent con-

duct. There is nothing to support their contentions excepting their own statement uncorroborated even by their own account books, while their whole conduct at execution and registration of the deed and subsequent thereto, when prior mortgages were redeemed, is entirely opposed to the view that they are the real beneficiaries under the mortgage-deed. On the other hand plaintiff's case is supported by reliable oral and documentary evidence, and he has throughout conducted himself as a person actually and really interested in the transaction. The mortgage-deed was no doubt held by the defendants and was produced by them in a previous enquiry, where again they were held to be mere *benamidars*. They may have secured possession of the mortgage-deed by theft as alleged by plaintiff, or for some other reason which has not been disclosed, but we have no doubt on the record that the mortgage consideration was paid solely by plaintiff and he is entitled to receive it. He is, however, not entitled to obtain a decree for more than what was actually received by the defendants. They have admitted having received Rs. 1,241 only under the mortgage-deed, and plaintiff is entitled to get a decree against them for the amount so admitted. He is not entitled to receive any interest subsequent to May 1898, when the money was received, as he has unreasonably delayed his claim, and for the same reason he is not entitled to get costs. We accordingly accept the appeal and pass a decree in plaintiff's favour for Rs. 1,241 against defendants 1 and 2. The suit will stand dismissed against the remaining defendants. Parties will bear their own costs throughout.

Appeal allowed.

No. 38.

Before Mr. Justice Rattigan and Mr. Justice Lal Chand.

BHAG SINGH AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

Versus

SHARAM SINGH AND OTHERS,—(PLAINTIFFS),—

RESPONDENTS.

Civil Appeal No. 333 of 1907.

Occupancy rights—Alienation of occupancy rights—Right of reversioner to contest alienation even after it had been successfully contested by the landlord—Custom—Alienation—Gift of occupancy rights to daughter in presence of near male collaterals—Chimas of mauza Bhamu Kalan in the Lahore District—Burden of proof.

Held that a reversioner is not debarred from suing to protect his reversionary interest against an alienation of occupancy rights merely be-

APPELLATE SIDE. {

cause such alienation has also been challenged by the landlord as an invalid alienation. The latter even if successful cannot on the death of the alienor step in and claim the holding if there is a reversioner entitled to succeed under Section 59 of the Act.

Held, also, that in matters relating to alienation of ancestral landed property the Chimas of mauza Bhama Kalan, who have for generations past followed agriculture and are solely dependent on land are governed by the general rules of agricultural custom and the *onus* of proving the validity of a gift of a share of an occupancy holding by a sonless male proprietor in favour of his daughter rests on the party asserting the existence of such a custom.

Found that the defendant had failed to prove that the gift was valid by the custom of the parties.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Lahore Division, dated 16th January 1907.

Oertel, for appellants.

Kamal-ud-din, for respondents.

The judgment of the Court was delivered by

LAL CHAND, J.—Bhag Singh, defendant, a Chima by 11th June 1907. caste, gifted on 10th March 1905 his one-fourth share in a joint occupancy holding, situate in mauza Bhama Kalan, in favour of his daughter's sons who are defendants 2 and 3 in the case. The suit was instituted on 3rd October 1905 by the plaintiffs-respondents for a declaration that the aforesaid gift shall not affect their reversionary rights as the property gifted was alleged to be ancestral and plaintiffs were collaterals and next reversionary heirs of Bhag Singh, the donor. The suit was instituted against Bhag Singh, the donor, and his daughter's sons, the donees, as well as against the proprietors of the occupancy holding.

The proprietors, who were defendants 4 to 9 in the plaint, at one time expressed their willingness to join as co-plaintiffs, but subsequently they applied to remain as defendants on the record-alleging that they themselves had sued on 11th December 1904, in the Revenue Court for setting aside the gift and for ejectment of the donees.

Both suits were heard together by the same officer Munshi Muhammad Ali Khan, who as a Subordinate Judge found in plaintiffs' favour and decreed their claim and as an Assistant Collector dismissed the revenue suit, instituted by the proprietors of the holding. Both judgments were delivered on the same date, *viz.*, on 24th July 1906, and in each case an appeal was preferred, *i. e.*, by the proprietors to the Collector of Lahore,

and by the donor and the donees to the Divisional Judge at Lahore. The decision of the First Court in the Civil suit was upheld in appeal on 16th January 1907, but its decision in the revenue suit was reversed by the Collector, who, on 6th March 1907, decreed the claim with a reservation that the decree will not affect Bhag Singh's right to hold the tenancy. The present appeal was filed two days later, *i. e.*, on 8th March, by Bhag Singh and his donees against the plaintiffs, who are found to be collaterals, and against the proprietors of the holding.

It was not contested at the hearing that the plaintiffs were not collaterals of Bhag Singh or that the property was not ancestral as claimed, but it was contended :—

- (1) that the proprietors of the holding having successfully challenged the gift, the suit by the reversioners was not maintainable;
- (2) that no custom applicable to the parties was proved which would render the gift in question invalid against plaintiffs as reversionary heirs of the donor.

Didaru v. Banna (1) was relied upon to support the first contention, and with reference to the second it was argued that the parties were not agriculturists by caste being Chimbas, that it was not proved that they had adopted the custom of agriculturists in matters of alienation of ancestral property, that the *onus* lay on plaintiffs to prove that by custom Bhag Singh was incompetent to alienate his share in the joint occupancy holding, and finally *Kasim v. Hashaman* (2), *Gopal Singh v. Sukha Singh* (3), *Jowahir Singh v. Yaqub Shih* (4), and *Atar Singh v. Prem Singh* (5) were referred to support the second contention. For the respondents the validity of the first contention was conceded, but on the second point it was urged that the parties were proved to have adopted agriculture as their sole occupation since several generations, that they were village *kamins* who would naturally adopt the custom of the proprietary body of the village, and that under the circumstances there was a very strong initial presumption that they have adopted agricultural customs in matters of alienation, and the *onus* there-

(1) 31 P. R., 1896, F. B. (3) 58 P. R., 1906.

(2) 39 P. R., 1906. (4) 5 P. R., 1906.

(5) 12 P. R., 1906.

fore lay on the donor that he was competent to gift ancestral property in favour of his daughter's sons. *Kaka v. Ranjit Singh* ⁽¹⁾, *Ram Mal v. Mussammatt Miran* ⁽²⁾, *Pir Bakhsh v. Mussammatt Amir Bibi* ⁽³⁾, *Rajad v. Lehn* ⁽⁴⁾, and *Sher Muhammad v. Fatteh Din* ⁽⁵⁾, quoted in the judgment of the First Court, were cited to support the argument. Despite the concession made by the pleader for the respondents, a concession which was however subsequently withdrawn as regards the first contention, we are of opinion that neither contention is maintainable or deserves to prevail.

The facts already stated show distinctly that at the time when the Civil suit was instituted by the plaintiff the gift in question had not been challenged by the landlords. Assuming therefore that the reversionary heirs are not entitled to sue for protecting their reversionary interests, in case the alienation is challenged by the landlords, the assumption would not evidently apply to a case like the present, where the landlords had actually stood aside until the suit was instituted in Court by the reversionary heirs. It would really be an anomaly were it held that a suit already instituted on a proper cause of action (assuming that the reversioners have the right to sue) should be defeated, because subsequent to its institution the landlord has elected to challenge the gift. If this view were conceded, a decree already obtained by the reversioners might be nullified by the landlord electing to challenge the alienation at the last stage of the hearing of the appeal filed by the alienee. The view contended for is therefore obviously untenable both on legal and equitable grounds.

But moreover there is no real authority to justify the assumption that when an alienation by an occupancy tenant is challenged by the landlord, the reversioners are debarred from suing to protect their reversionary interests if they have any. The point in question is not exactly covered by any authority. *Didaru v. Bannu* ⁽⁶⁾ was a case of sale of occupancy rights to the landlord, and it was held by the Full Bench that a suit by the reversioners to challenge the sale was not maintainable. A similar view was maintained by a Full Bench in *Nihal Singh v. Khazan Singh* ⁽⁷⁾, where the sale was in favour of one out of several landlords.

(1) 51 P. R., 1901.

(2) 30 P. R., 1896.

(3) 17 P. R., 1885.

(4) 96 P. R., 1905.

(5) 8 P. R., 1902.

(6) 31 P. R., 1896, F. B.

(7) 24 P. R., 1902, F. B.

A reversioner's right, however, to challenge the alienation when made in favour of a person other than the landlord was acknowledged and recognised by Full Bench judgment in *Karam Din v. Sharaf Din* ⁽¹⁾, and it was held that the reversioner as well as the landlord had the right to challenge an unauthorized alienation provided the former had the right by custom to contest the alienation.

In *Mukarrab v. Fatta* ⁽²⁾ the suit by a reversioner to contest an alienation of occupancy right was actually decreed. The same was the result in *Gulab v. Mussammatt Jioni* ⁽³⁾—(a case of gift by an Arain to his daughter's son)—and in *Puran Chand v. Mahesha* ⁽⁴⁾, and *Hari Chand v. Dhera* ⁽⁵⁾, although in *Puran Chand v. Mahesha* ⁽⁴⁾ the mortgage was found to have been effected with consent of the landlord. In *Faiz Bakhsh v. Ditta* ⁽⁶⁾, the suit was dismissed on the ground that the reversioners had failed to prove a custom authorizing them to sue to set aside the alienation. In these cases the alienations were obviously either in favour of the landlord or were made with his consent, or he was found to have stood aside and taken no action. These cases are therefore inapplicable to the present dispute, where the alienation is actually challenged by the landlord, who has moreover sued and obtained a decree already. Viewing the question therefore in the light of general principles and apart from authorities, which, as shown already, are inapplicable, it does not appear to us that there exists any valid grounds or sound reasons for holding that a reversioner is debarred from suing to protect his reversionary interest against an alienation of occupancy rights merely because such alienation has also been challenged by the landlord as an invalid alienation. As recognized by the Full Bench judgment in *Karam Din v. Sharaf Din* ⁽¹⁾, and by a long course of decisions of this Court a reversioner of an occupancy tenant is certainly possessed of an independent interest, which, when he is the next heir, may entitle him by custom to question the alienation and to sue for protecting his reversionary interest. The right is not directly conferred by the Tenancy Act, but may notwithstanding be proved to exist under the Customary Law, independently of the provisions of the Act. It may be as has been held that the right is not

⁽¹⁾ 89 P. R., 1898, F. B.

⁽²⁾ 88 P. R., 1895.

⁽³⁾ 49 P. R., 1899.

⁽⁴⁾ 69 P. R., 1900.

⁽⁵⁾ 12 P. R., 1904.

⁽⁶⁾ 115 P. R., 1901.

enforceable against the landlord when the sale is effected in his favour on the ground that the occupancy tenure is held to have been extinguished by the sale. But when the right is not so extinguished and is proved to exist by custom, why should it be held that the reversionary heir is incompetent to protect his own interest against the alienation merely because the landlord elects to enforce his own remedy under the Tenancy Act. The two remedies exist side by side and are quite compatible and no way inconsistent with each other. The alienation is void against the landlord under Section 60 of the Tenancy Act, and if he chooses he can sue to protect his own interest. But this is all that he is entitled to claim under the provisions of the Act. Even if successful the decree passed in his favour cannot affect the future succession to the occupancy holding. When the alienor dies, the landlord by reason of his decree would not be competent to step in and claim the holding if there exists a reversioner who is entitled to succeed under Section 59 of the Tenancy Act. The decree passed in favour of the landlord does not therefore settle the future succession to the holding, and *à fortiori* cannot affect the reversioner's present right to protect his reversionary interest and claim a declaration that the alienation made by the holder of the tenure shall not affect his reversionary interest after the death of the alienor. This is exactly the form and essence of the present suit, and it is inconceivable why it should be held that the suit is unmain-
tainable because the landlord has elected to enforce his own remedy under the Tenancy Act. If the contention raised were accepted, it would result in a pure anomaly. When the tenant dies, a suit for possession by the landlord would be met by the plea that he was not entitled to sue as the tenancy had not lapsed under Section 59, there being in existence male collaterals entitled to succeed. To a suit for possession by the reversionary heirs the reply would be that they were incompetent to contest the gift because the landlord had challenged it, and they were therefore not entitled to receive or recover possession. Such an anomalous and palpably unjust result could not have been contemplated by the Tenancy Act, and it is opposed on the face of it to rules of justice, equity and good conscience. We are therefore not prepared to accept the validity of the first contention and we hold that the plaintiffs are competent to contest the gift though it has been challenged successfully by the landlord in the revenue suit. As regards the second contention, it is clear on the facts that the family has owned the tenancy in dispute for the last two hundred years. It is a large

holding consisting of over 1,600 *kanals* of land, and there is no room for doubt that agriculture has formed the sole occupation of the family for several generations. The proprietary body are Jats and the parties who are Chimbas by caste are described as Chimbas Got Gil in the 1st Settlement Records and as *kamins* in the later Settlement Records. There is thus a natural presumption under the circumstances that they have adopted the custom of their masters, the proprietors of their village, with whom they probably settled as village menials, and by whom they were given the land in which they have since acquired the occupancy status.

This presumption is specially strong in the present case as the property in dispute is agricultural land and agriculture is found to be the sole source of sustenance followed and adopted by the family for the last two centuries. They have not changed or abandoned their caste which was impracticable though apparently an attempt to change the caste was made at the time of the first Settlement. But by abandoning the proper calling of their caste and adopting agriculture as their occupation they have drifted inside the fold of agricultural tribes and may well be presumed to follow their customs in matters relating to alienation of landed property, customs which owe their origin to possession of land and are in the main the necessary incidents of agricultural occupation. In this respect the parties though Chimbas by caste are hardly distinguishable from the Jats, whom they originally served, and with whom they probably settled in the village. They occupy a lower status in the scale of social economy, but still form part members of an agricultural community, which doubtless admits of various grades and are therefore presumably governed by same or similar custom in matters relating to alienation of landed ancestral property. This view is amply supported by several cases quoted by the Lower Courts. *Kaka v. Ranjit Singh* ⁽¹⁾ was a case of Lobars of Jamsher in the Jullundur District. The parties in *Ram Mal v. Mussammatt Miran* ⁽²⁾ were Telis of Lahore City. *Pir Bakhs v. Mussammatt Amir Bibi* ⁽³⁾ was a case of Chimbas of Gujranwala District. In *Rajada v. Lehn* ⁽⁴⁾, the parties were Jhiwars of the Hoshiarpur District. *Sher Muhammad v. Fattah Din* ⁽⁵⁾ was a case of Rawals of Kangra District, and *Kasim v.*

⁽¹⁾ 51 P. R., 1901.

⁽²⁾ 30 P. R., 1896.

⁽³⁾ 6 P. R., 1902.

⁽⁴⁾ 17 P. R., 1888.

⁽⁵⁾ 96 P. R., 1905.

Hasham (1) was a case of Lohar Turkhan of the Gujrat District.

In all these cases relating to village *kamins* customary law was held to apply as regards power to alienate landed ancestral property. The cases quoted for appellants relating to Koreshis, Khattris and Brahmans, *viz.*, *Jowahir Singh v. Yaqub Shah* (2), *Atar Singh v. Prem Singh* (3), *Gopal Singh v. Sukha Singh* (4), stand on an entirely different footing, though even in the last case agricultural custom was held to govern Brahman Sikhs who had abandoned the Brahmanical thread and had for generations past followed agriculture as their main occupation. We therefore hold in concurrence with the Lower Courts that the parties to the present case are presumably governed by agricultural custom and that Bhag Singh had not an unrestricted power to alienate landed ancestral property. It makes no difference that the property alienated in the present case is a share in the occupancy holding and not proprietary right. *Faiz Bakhsh v. Ditta* (5), *Karam Din v. Sharaf Din* (6), and *Hari Chand v. Dhera* (7), were referred to at the hearing to support either side, but it is unnecessary to discuss these cases as the matter is now settled by the Full Bench judgment in *Abdulla v. Allah Dad* (8). It was held there that the initial *onus* in such suits is on the plaintiff. "But when he has proved "first that he is entitled to succeed to occupancy rights on "the death of the occupancy tenant, and second that had "the subject matter in question been a proprietary right "instead of a right of occupancy he could have maintained "the suit, the *onus* will be shifted and it will be upon the "person who asserts that no such custom obtains as to occupancy rights to prove that contention."

It is conceded in the present case that plaintiffs are entitled to succeed under the Tenancy Act on death of Bhag Singh, donor, and we have held that the parties are presumably governed by custom of agricultural tribes and that Bhag Singh had not an unrestricted power to alienate ancestral landed property. It is clear therefore that had the subject matter in dispute been a proprietary right instead of a right of occupancy, the plaintiff would be competent to contest the alienation. The *onus* therefore was shifted and

(1) 39 P. R., 1906.

(2) 5 P. R., 1906.

(3) 12 P. R., 1906.

(4) 58 P. R., 1906.

(5) 118 P. R., 1901.

(6) 89 P. R., 1898, F. B.

(7) 12 P. R., 1904.

(8) 98 P. R., 1907, F. B.

it lay upon the defendants to prove that no such custom obtains as to occupancy rights. This they have failed to prove, and practically it was impossible to prove as the alienation in question is the first instance in the village of an alienation of occupancy right. The gift in question is doubtless in favour of a daughter's son, but that circumstance again is of no avail to the defendants and does not in any manner improve their case. A daughter's son is not an heir under the provisions of the Tenancy Act, and there is no proof on the record that a gift in favour of a daughter's son is sanctioned by Jat custom or special custom of the caste of the parties. The parties being presumably governed by custom of agricultural tribes, the initial presumption lay against the validity of any such gift in the presence of near reversioners as the plaintiffs are. The *onus* therefore lay on the defendants to prove that the gift was authorized by custom and this they have failed to discharge. We therefore feel constrained to hold that the gift in question is invalid and shall not affect plaintiffs' reversionary rights on death of Bhag Singh. But we consider it would be equitable to leave the parties to bear their own costs in the case as it is the first instance of alienation of occupancy rights in the village and the gift is invalidated by reason of a presumption natural and reasonable under the circumstance, but still a presumption and not actual proof that the parties, though non-agriculturists by caste, are governed by custom of agricultural tribes in matters relating to alienation of ancestral landed property. We accordingly dismiss the appeal, but direct that the parties do bear their own costs throughout.

Appeal dismissed.

No. 39.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

MUNNI,—(DEFENDANT),—APPELLANT,

Versus

UMRAO SINGH,—(PLAINTIFF),

AND

JIO AND ANOTHER,—(DEFENDANTS),

}—RESPONDENTS.

Civil Appeal No. 124 of 1906.

APPELLATE SIDE.

Gift—Gift to two or more persons without specifying their respective shares—Construction and nature—Tenants in common—Share of each passes to his representative—Hindu Law—Inheritance of stridhan—Marriage in appro ed form.

'A,' a Hindu widow, by a registered deed gifted one of her houses to her four married daughters without specifying the shares

upon which the donees were to hold the house severally. After the death of one of the daughters the other three sold the entire house. Thereupon the husband of the deceased donee sued to recover one-fourth share of the sale price in respect of her one-fourth share of the house. The defence contended that the gift was one in joint tenancy with right of survivorship, and that therefore on the death of one of the four donees the share of the deceased lapsed to the survivors ; and that in any case the share of the deceased being her *stridhan* would go to her mother and, failing the latter, to her sisters.

Held, that a gift to two or more persons is not a gift in joint tenancy merely because the shares of the donees are not defined therein, and that in cases where the donees are incapable of forming a joint Hindu family they should, in the absence of a declaration in the deed of gift to the contrary, be presumed to hold as tenants in common without benefit of survivorship in which case the share of those dying passes to their personal representatives.

Held, also, that the *stridhan* of a Hindu wife dying childless who has been married in one of the four approved forms of marriage devolves upon her husband and not on her parents or their heirs.

Further appeal from the decree of W. A. Le Rossignol, Esquire, Divisional Judge, Delhi Division, dated 9th November 1905.

Shadi Lal, for appellant.

Devi Dial and Chuni Lal, for respondents.

The judgment of the Court was delivered by

SHAH DIN, J.—The facts of this case which are material to this appeal are as follows :—

One Mussammat Sukh Dei by a registered will, dated 25th January 1900, bequeathed certain property situate in Delhi to her four married daughters, —Mussammat Jio, wife of Ram Narain ; Mussammat Munni, wife of Nand Kishore ; Mussammat Nanni, wife of Chandar Bhan ; and Mussammat Rama Nandi, wife of Umrao Singh. On 28th January 1902 Mussammat Sukh Dei by a registered deed gifted the property in suit (a house which formed part of the property covered by the will) to the same four daughters without specifying the share upon which the donees were to hold the house severally. One of these daughters, Mussammat Rama Nandi, wife of Umrao Singh, plaintiff, died in October 1902. Mussammat Sukh Dei, the mother, died in January 1905 leaving her surviving the three daughters (donees) who are defendants Nos. 1 to 3 in the present suit. On 6th April 1905 the latter sold the entire house, which had been gifted to them and their deceased sister in 1902, to defendant No. 4 for Rs. 10,500. The plaintiff, who claimed to be the sole heir of his deceased wife Mussammat Rama Nandi, sued to recover

1st Feby. 1907.

from the defendants one-fourth share of the sale price in respect of her alleged share in the house. The defence briefly was (1) that the gift made to the four sisters in 1902 was a gift in joint tenancy, and that on the death of plaintiff's wife, Mussammat Rama Nandi, the whole house became the property of defendants Nos. 1 to 3 as surviving joint tenants; and (2) that in any case the one-fourth share of the house in dispute being the *stridhan* of plaintiff's wife, plaintiff was not entitled to succeed to it in the presence of the deceased's mother and sisters. The first Court decided that the gift was not one in joint tenancy, and that under the Hindu Law by which the parties were admittedly governed, the plaintiff was entitled to succeed to his deceased wife's *stridhan* to the exclusion of her mother and sisters. The Lower Appellate Court concurred in the view of the First Court and upheld the order decreeing the plaintiff's claim.

The defendants appeal to this Court, and on their behalf Mr. Shadi Lal again contends (1) that the gift in dispute was one in joint tenancy, and that on the death of Mussammat Rama Nandi, her sisters (the defendants) became entitled to the whole house as joint tenants; and (2) that assuming that the donees were tenants in common, the share of the plaintiff's deceased wife being her *stridhan*, would go, not to her husband, but to her mother, and failing the latter, to her sisters.

In support of the first contention Mr. Shadi Lal relies upon *Narpat Singh v. Mohamed Ali Hussain Khan* ⁽¹⁾, *Mussammat Umrao Kaur v. Tej Singh* ⁽²⁾, *Venkayamma Garu v. Venkataramanayamma Bahlur Garu* ⁽³⁾, *Mankamna Kumbar v. Balkishan Das* ⁽⁴⁾. On the other hand the counsel for the respondent cites *Yethirajulu Naidu v. Mukunthu Naidu* ⁽⁵⁾ as an authority in support of the view taken by the Courts below as to the nature of the gift in question.

After giving our very best consideration to the arguments of counsel on both sides and carefully weighing the circumstances of the case, we think that the first contention of the appellant's learned counsel must fail. The principle applicable to cases like the present is, we consider, that laid down by their Lordships of the Privy Council in *Jageswar Narain Deo v. Ram Chandra Dutt* ⁽⁶⁾ and followed by the Madras High Court in *Yethirajulu Naidu v. M. . . .* ⁽⁵⁾ at page 373. In the

⁽¹⁾ I. L. R., XI

⁽²⁾ 27 P. R., 15

⁽³⁾ I. L. R., 8

⁽⁴⁾ I. L. R., XXVIII All., 33.

⁽⁵⁾ I. L. R., XXVIII Mad., 363.

J. ⁽⁶⁾ I. L. R., XXIII Calc., 670, P. C. L. R., 23 I. A. 37.

first mentioned case, a Hindu testator had given a four-anna share of his estate to his daughter and her son with power of making alienation thereof by sale or gift, but without using any words indicating that the latter were to take a two-anna share of the estate in severalty. On the mother conveying her own two-anna share to a third party, the son brought a suit to have the conveyance declared null and void, and one of the arguments advanced before their Lordships of the Privy Council was that under the will the mother and the son had become joint tenants of the four-anna share of the testator's estate, and that therefore her alienation of her alleged two-anna share was under the circumstances void. Their Lordships in noticing this argument observe at page 678 (para. 3) of the report as follows :—

“In his argument for the appellant, Mr. Branson raised a new point, * * * He maintained upon the authority of *Vydinada v. Nagammal* ⁽¹⁾ that, by the term of the will, the Rani and the appellant became, in the sense of English Law, joint tenants of the four-anna share of Silda, and not tenants in common, and that her alienation of her share before it was severed and without the consent of the other joint tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here; and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principal of joint tenancy appears to be unknown to Hindu Law except in the case of coparcenary between the members of an undivided family.”

The principle laid down in this case by the judicial committee is referred to and amplified by Mr. Justice Subrahmanya Ayyar in *Yethirajulu Naidu v. Mukunthu Naidu* ⁽²⁾ at page 373 in the following terms :—

“The remaining point for consideration in connection with this house is whether the sons took it as tenants in common as contended on behalf of the fourth defendant. The decision of the judicial committee in *Jogeswar Narain Deo v. Ram Chand Dutt and others* ⁽³⁾ points out that the principle of joint

(1) I. L. R., XI Mad., 258. (2) I. L. R., XXVIII Mad., 363.

(3) I. L. R., XXIII Cal., 670.

"tenancy as obtaining in England is quite foreign to the Hindu Law, and that when property is gifted to more than one in the absence of anything in the grant to the contrary the presumption is that the donees take as tenants in common. But as implied in that decision itself joint ownership of another description is of course not only not foreign to the Hindu system but quite familiar to it, *viz.*, that special kind of which the joint holding of the members of an undivided Hindu family, is the type. And in cases like the present the question for determination is but one of intention to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a Hindu joint family they can of course take only as tenants in common. If on the contrary the grant is to persons who constitute such a family even then it may be that the *primâ facie* view is that they take in severalty, and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will. Of course the donees here, the sons, were persons who could be and were members of a joint family. In fact, in one part of the will the testator himself observes: 'therefore I and my sons are members of an undivided family'."

The view of the law enunciated in the above extract from the judgment of Mr. Justice Subrahmaniam Ayyar, which is but an amplification of the principle laid down by their Lordships of the Privy Council in *Jogeswar Narain Deo's case*, is perfectly sound and should, we consider, be followed in this case. Here the donees, the four married daughters of Mussammatt Sukh Dei, who was a widow, were not at the date of the gift members of an undivided Hindu family, there being no suggestion that their husbands were living with Mussammatt Sukh Dei at the time, and this being the case full effect must be given to the presumption, until the contrary is clearly shown by the terms of the deed of gift, that the donees took as tenants in common and not as joint tenants. The mere fact that in the deed there are no expressions (*e.g.*, *ba hissa-i-barabar*—in equal shares) such as would indicate an intention on the part of the donor to confer on the donees estates in severalty, does not, in a case like the present, rebut the presumption above referred to, and we are fortified in this view by the fact that in the Privy Council case no such expressions occurred in the will under which a four-anna share was given to the mother and son, and yet their Lordships refused to accept the contention that the principle

of joint tenancy applied to that case. No doubt in the Madras case the terms of the gift, as interpreted by the learned Judges, clearly indicated that the donees there were to take not in severalty but in co-parcenary, but it is obvious from the observations which have been quoted above that, apart from any such interpretation, the fact that the donees were members of a joint Hindu family was the main consideration which led to the conclusion that they took as joint tenants.

The decisions relied upon by Mr. Shadi Lal are clearly distinguishable from the present case. In *Narpat Singh v. Muhammad Ali Hussain Khan* ⁽¹⁾, the grant of assignment of land revenue by Government, which had to be construed, was one to "Jagraj's widow and his family," and their Lordships of the Privy Council accepted as correct the statement of the case as embodied in the judgment of Judicial Commissioner in the following terms :—

"The grant was made to the family of Jagraj Singh jointly. As the Government in no way defined the rights assigned to each grantee, the three persons who composed the family must be held to have been joint owners; and on the death of the two children their mother, as survivor, became sole owner." It is obvious that the principle enunciated in this passage is identical with the one laid down in the later Privy Council case and followed in the Madras decision cited above. In *Mussammatt Umrao Kaur v. Tej Singh* ⁽²⁾, the grant made by Government was to the members of a Sikh family in terms substantially similar to those of the grant in Narpat Singh's case, and this Court without laying down any principle of universal application such as would govern a case like the one before us, followed the Privy Council decision, which was exactly in point. Again in *Mankanna Kunwar v. Balkishan Das* ⁽³⁾, the gift there in question was to two brothers, "members of a joint family" (page 39), and all that the learned Judges observed in that case was this : "It appears to us that in India, where the joint family is so well recognised, a gift to two brothers, members of a joint family without indicating that they were to take as tenants in common, constitutes a gift in joint tenancy." The words in italics furnish the true *ratio decidendi* which, while in no way helping the appellant, is clearly in consonance with the

⁽¹⁾ I. L. R., XI Calcutta, 1, P. C. ⁽²⁾ 27 P. R., 1891.

⁽³⁾ I. L. R., XXVIII All., 38.

principle which we are disposed to follow in this case. The decision of the Judicial Committee in *Venkayamma Garu v. Venkaturmanayamma Bahadur Garu* ⁽¹⁾, has not been seriously pressed upon our attention and could not well be so pressed, seeing that the passages at pages 686 and 687 of the report upon which reliance was placed, relate to the question of inheritance according to Hindu Law and have no practical bearing upon the point under consideration in this case.

For the foregoing reasons we hold that the gift of 1902 was not a gift in joint tenancy, and that on the death of Mussammatt Rama Nandi, plaintiff's wife, in October of that year, her sisters did not become owners of the whole house in dispute by survivorship.

As regards the second contention raised by Mr. Shadi Lal, it is conceded on both sides that the one-fourth share of the house in question having been gifted to Mussammatt Rama Nandi by her mother subsequently to her marriage, must be treated as her *ayautaka stridhm*. It is, however, argued for the appellant that the *ayautaka stridhm* of a deceased Hindu lady devolves first upon her parents, and then upon her husband, and that since at the death of Rama Nandi her mother was alive, the plaintiff was excluded from the line of heirs by the mother, whose rights subsequently devolved upon the surviving sisters of Rama Nandi, defendants Nos. 1 to 3. In support of this argument reliance is placed by Mr. Shadi Lal upon paragraph 673 (page 900) of Mayne's Hindu Law (7th Edition), and especially upon the following sentence:—
 "The succession then proceeds, as in the case of *yautaka*,
 "down to the great-grandson of the co-wife, after which
 "it goes to the brother, mother, father, and husband under
 "the text of Yajnavalkya already cited." But the learned counsel has overlooked the fact that the whole of this paragraph relates to the devolution of property given by the father and embodies the rule of devolution according to the Dayabhaga or Bengal School of Hindu Law. See *Gopal Chandra Pal v. Ram Chandra Pramanik* ⁽²⁾. The parties to this case are governed by the Mitakshara School, and the rule of devolution of both *yautaka* and *ayautaka stridhm* according to that school of law is that stated in paragraphs 669 and 671 of Mayne's Hindu Law, viz., "the *stridhan* of a wife dying
 "without issue who has been married in one of the four

⁽¹⁾ I. L. R., XXV Mad., 678, P. C. ⁽²⁾ I. L. R., XXVIII Cal., 311.

"forms of marriage designated Brahma, etc., belongs to the husband * * * * ; should she have been married in another form then her *stridhan* goes to her parent." The whole question has been fully discussed by Mr. Justice Banerjee in his learned judgment in *Jagannath Prasad Gupta v. Ranjit Singh* ⁽¹⁾ at pages 366-367 where the rule laid down is identical with that stated by Mr. Mayne; and there can be no question that under that rule Mussammat Rama Nandi's share of the house in dispute devolved after her death upon her husband, the plaintiff, and not upon her mother.

Both the contentions of the appellant's counsel must, therefore, be overruled. We accordingly maintain the decree of the Lower Appellate Court, and dismiss the appeal with costs throughout.

Appeal dismissed.

No. 40.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

MAHAN KAUR,—(DEFENDANT),—APPELLANT,

Versus

SUNDAR DAS,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 340 of 1906.

Custom—Inheritance—Widow's right to succeed to her husband's collaterals—Udasi Sadhs of tahsil Muktsar, District Ferozepore.

Found that by custom among Udasi Sadhs of the Muktsar tahsil of the Ferozepore District a widow of a sonless proprietor was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.

Further appeal from the decree of Kazi Muhammad Aslam, Divisional Judge, Ferozepore Division, dated 8th January 1906.

Golak Nath, for appellant.

Sangam Lal, for respondent.

The judgment of the Court was delivered by

SHAH DIN, J.—The parties to this appeal are Sikh Jats 23rd Feby. 1907. of the sect of Sadh Udasis of the Muktsar tahsil of the Ferozepore District. One Ram Das left four sons, Narain

(1) I. L. R., XXV Calc., 354.

Das, Sadanand, Hari Das, and Sundar Das. Narain Das died about fifteen years ago, and left a widow, Mussammat Mahan Kaur, the defendant in this case. The share of Narain Das in the holding held jointly by all the brothers was mutated on his death in favour of Mahan Kaur. About five years ago Sadanand died without issue, and his share was mutated in the names of Sundar Das, the plaintiff, and Mussammat Mahan Kaur, in equal shares, the fourth brother having apparently died prior to the mutation proceedings.

The defendant, Mussammat Mahan Kaur, applied recently to the revenue authorities for partition of her share in the joint holding both as regards the land which had been left by her husband, Narain Das, and in respect of the land to which she had succeeded on the death of Sadanand. The plaintiff, Sundar Das, objected to the partition of the share left by Sadanand on the ground that the defendant had no right to succeed collaterally to the said share, and that mutation of names in respect of that share had been erroneously effected in her favour. The entries in the revenue papers being in defendant's favour, the revenue authorities referred the plaintiff to a Civil Court to establish his exclusive title to Sadanand's share. Hence the present suit.

The First Court held that the defendant had proved a custom under which she was entitled to succeed to the land left by Sadanand in the same way as her husband would have succeeded if he had been alive. The plaintiff's suit was, therefore, dismissed. On appeal the learned Divisional Judge decreed the claim, holding that the instances of widow's collateral succession upon which the First Court had relied were insufficient to prove the custom set up by the defendant. The defendant appeals.

After hearing arguments and carefully considering the evidence on the record, we think that this appeal must succeed. Although in view of the recent rulings of this Court in *Saddan v. Khemi* (1) and *Lahori v. Radho* (2), it is open to serious doubt whether among agricultural tribes the right of a Hindu widow to succeed collaterally is exceptional or unusual, we shall, for the purpose of this appeal, accept the contention that the *onus* of proving the custom pleaded by Mussammat Mahan Kaur lies upon her. This *onus*, we think, she has fully discharged.

The parties produced no evidence in Court on the question of custom. A commission was issued for a local enquiry to the Tahsildar who, after having allowed the parties full opportunity to produce evidence and having made as full an investigation as he could make in the locality, reported in favour of the custom set up by the defendant. It appears from his report that no judicial decisions bearing upon the question under consideration could be traced, but he refers to four mutation orders which go to show that among 'Sikh Jats of the Sidhu caste in the Muktsar *tahsil* widows have succeeded to the property left by their husbands' collaterals. These instances have been discussed in detail by the counsel for the appellant, and practically nothing has been urged by the respondent's pleader to show that they do not afford a reliable evidence of custom. The custom set up is a tribal, and not a village, custom; and therefore the circumstance that the instances in question are not of the village in which the parties reside nor of the *got* to which they belong (the Udasi Sadhs being admittedly a very small community), is not a material obstacle to our accepting them as sufficiently supporting the defendant's position. In connection with this part of the case we attach the very greatest importance to the fact, the full weight of which has not been appreciated by the Lower Appellate Court, that the plaintiff expressly consented to the mutation of names being effected in defendant's favour in respect of the share in dispute on the death of Sadanand, and that mutation was made accordingly on 3rd February 1901. The plaintiff's pleader has not attempted to explain in this Court why his client had so consented if, according to the custom applicable to the parties' *got*, the defendant was not entitled to succeed collaterally to Sadanand's estate. Nor is there much force, it seems to us, in the argument, which apparently commended itself to the Lower Appellate Court, that as none of the mutation entries relied upon for the defendant was made the subject of litigation in Court, these are of no value as evidence of custom. We need only quote in this connection the following observations from the judgment of this Court in *Saddan v. Khemi* (1), in which we fully concur:—

"There are also four instances in which widows have been shown by entries in mutation orders to have succeeded without dispute to the property of their husbands'

(1) 15 P. R., 1906.

“collaterals. The learned Divisional Judge treats those as
 “not very material, and counsel for the respondent urges on
 “the authority of remarks in certain judgments of this Court
 “that these instances are of no value as they were not dis-
 “puted. Now, we quite concur in the view that single iso-
 “lated instances, in which there has been mutual consent,
 “are not of great value, but we are of opinion that the very
 “best possible evidence of a custom is that which shows
 “that it has been followed consistently in a number of in-
 “stances *without dispute*. Even a judicial decision in a con-
 “tested case shows that at least the custom is not universally
 “admitted. We, therefore, attach a high value to the four
 “instances produced, two in Jagraon and two in Phillaur,
 “in which widows were allowed, as a matter of course, to
 “succeed to the property of their husband’s collaterals with-
 “out dispute.”

These observations apply with full force to the present case; and we think, after a careful consideration of the four instances relied upon by the defendant’s counsel and of the authorities which are fully reviewed in *Saddan v. Khemi* ⁽¹⁾, that the defendant, Mussammat Mahan Kaur, has proved that she is entitled under the custom by which the parties are governed to succeed to the land left by Sadanand in the same way as her husband would have succeeded if he had been alive.

We accordingly accept this appeal and dismiss the plaintiff’s suit with costs throughout.

Appeal allowed.

No. 41.

Before Mr. Justice Shah Din.

RAJ MAL AND OTHERS,—(PLAINTIFFS),—
 APPELLANTS,

Versus

SANDHI,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 1185 of 1906.

APPELLATE SIDE. {

Custom—Inheritance—Right of a collateral who had abandoned his ancestral holding and resided in a different village.

Held, that the fact of a person having abandoned his ancestral holding and severing his connection with his village of origin and settling

⁽¹⁾ 15 P. R., 1906.

in another village for good does not necessarily debar him or his sons from succeeding to his or their collaterals' property in the ancestral village.

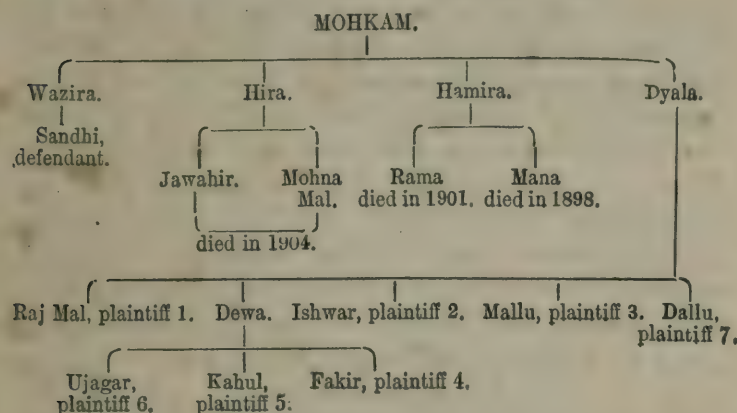
Further appeal from the decree of Captain B. O. Roe, Divisional Judge, Jullundur Division, dated 18th July 1906.

Gobind Ram, for appellants.

Vishnu Singh, for respondent.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The following pedigree table will explain 4th April 1907. the relationship of the parties :—



The plaintiffs are resident of *mauza* Samtai, and the defendant is resident of *mauza* Bilga, in the Phillaur *tahsil* of the Jullundur District. The plaintiffs brought a suit for possession by inheritance of one-half of the property, consisting of land and houses, situate in *mauza* Bilga, left by the descendants of Hamira and Hira, which is in possession of the defendant Sandhi, on the ground that they, as descendants of Dyala, the fourth son of Mohkam, the common ancestor of the parties, were entitled to share equally with the defendant in the inheritance left by their deceased collaterals. The defendant did not dispute the plaintiffs' relationship as alleged, or that the property was ancestral, but pleaded that the plaintiffs' father, Dyala, had left the ancestral village Bilga, in which the property in suit is situate in Sikh times and had taken up his residence with his father-in-law in *mauza* Samrai, at a distance of 7 *kos* from Bilga; that Dyala had been adopted (probably meaning thereby that he had been made a *ghar-jaur*) by the father-in-law; that he had abandoned and severed all connection with his ancestral land at Bilga; that the plaintiffs had unsuccessfully tried to recover

by suit possession of their paternal holding in 1889 ; and that, therefore, they were excluded from inheritance as regards the Bilga estate and had no right to succeed to the property in dispute. The sole issue framed by the First Court upon the pleadings of the parties was whether the plaintiffs by reason of their being residents of *mauza* Samrai and in consequence of their father Dyala having left the ancestral village were precluded from claiming their rights of inheritance in the property left by their deceased collaterals in the latter village. Upon this issue the First Court found in favour of the plaintiffs, holding that though in the litigation of 1889 (which will be referred to presently) between the plaintiffs on the one hand and the descendants of Hira, Hamira and Wazira on the other, it was decided that the plaintiffs' father had abandoned his land in *mauza* Bilga, yet the plaintiffs could not be deprived, solely by reason of such abandonment by their father of his own land and of their residence in *mauza* Samrai, of the rights of succession to property in *mauza* Bilga, which had accrued to them after the abandonment aforesaid and in consequence of their collaterals' deaths. The plaintiffs' suit was, therefore, decreed.

On appeal the learned Divisional Judge held, relying upon the result of the suit of 1889 above referred to, that the descendants of Dyala must be taken to have abandoned all claims to Mohkam's land, and he accordingly dismissed the plaintiffs' claim.

On appeal before me, it was contended that under the circumstances disclosed in this case, the plaintiffs should not be held to have abandoned their rights of succession as regards the property left by the descendants of Hira and Hamira, both because these rights had never accrued to their (plaintiffs') father, who in the suit of 1889 was found to have abandoned his own land, and because the plaintiffs derive their right to sue in respect of the land in dispute from the common ancestor, Mohkam, and not from their father, Dyala. After giving my best consideration to the matter, I think that this contention must prevail.

The record shows that in the first Regular Settlement of 1855 Mohkam's land was entered in the names of all four sons, including Dyala, but the latter being absent in Samrai was recorded as out of possession. On his death his share was again entered in the names of the present plaintiffs as absentees, the other members of the family being shown as

in possession. In 1889, the plaintiffs brought a suit against all their collaterals for recovery of their paternal estate, but their suit was dismissed on 30th May 1889, on the ground that the conduct of their father had been such as to evince an intention to abandon his share of the ancestral land.

The learned Divisional Judge has held that the dismissal of the plaintiffs' suit in 1889 bars their present claim, and in support of that view the respondent's counsel faintly relied upon the rulings of this Court in *Kaila Singh v. Tahal Singh* (1) and *Lakha v. Hari* (2). These rulings, however, are not in point. They have been discussed at some length in the later decisions of this Court in *Chet Singh v. Samand Singh* (3) (p. 274), and *Kala Singh v. Narain Singh* (4) (pp. 299—300), and certain observations which appear to lend considerable support to the argument of the appellants' counsel. The latter also relied in support of his contention on the Full Bench ruling of this Court in *Daya Ram v. Shohel Singh* (5), and more especially upon the following observations of Mr. Justice Chatterjee at p. 424 of the report :—

“I am also not clear that there is any distinct rule of customary law, under which a man's relations are precluded from claiming succession to his land merely because they do not reside or are proprietors in the village in which such land is situate. I have already discussed the right of escheat of the owners of the village. *Rukan Din v. Mussammat Mariam* (6), *Chet Singh v. Samand Singh* (7) and *Kala Singh v. Narain Singh* (4) are authorities in support of the view that the agnates, even with the disqualification mentioned above, are entitled to succeed, where the land claimed is “ancestral.”

No doubt the precise point involved in the present case is not directly covered by the Full Bench ruling above cited, but if it is permissible, in accordance with the opinion of the majority of the Court in that decision to fall back on the personal law of the parties for the determination of the point in issue, there being no definite rule of customary law applicable to it, the plaintiffs must, I think, succeed. It is further clear that they would succeed, if the land were in the possession of a proprietor in *mirza* Bilga, who was not an agnate of the deceased childless proprietors. Does then the

(1) 143 P. R., 1888.

(2) 64 P. R., 1893.

(3) 78 P. R., 1898.

(4) 75 P. R., 1902.

(5) 110 P. R., 1906, F. B.

(6) 68 P. R., 1898.

(7) 78 P. R., 1898.

mere fact of the land being in the possession of an agnate of theirs bar the plaintiffs' right of succession? I think not. It is argued by the Divisional Judge that the plaintiffs' right is barred because their father Dyala abandoned his ancestral holding and severed his connection with his village of origin and settled in Samrai long before the first Settlement. But did or could Dyala by abandoning his land in Bilga abandon all his future rights of succession, which admittedly had not come into existence at that time. If he could do so, could he abandon the rights of his sons to collateral succession in the family which were to accrue to them after his death, and which were derivable from the common ancestor, Mohkam? or to put the matter in another way, suppose instead of abandoning his land, Dyala had sold it either (a) to a member of the family, or (b) to a proprietor in the village, who was not a relation, and had thereafter taken up his residence with his father-in-law at Samrai, could it be argued that by reason of such sale, and because of his subsequent residence at Samrai, he, and, after him his sons, would be debarred from succeeding to his and their collaterals' property in the ancestral village. Or suppose the land abandoned by Dyala had been taken possession of, not by his brothers, but by another landowner in Bilga, and the present plaintiffs had failed to recover possession from him, just as they failed to do so against their uncles in 1889, would that failure have been sufficient to deprive them of their rights of inheritance in the village. All these questions must, I think, be answered in the negative, for the simple reason that the plaintiffs' rights of succession, which they are endeavouring to enforce, accrued to them on the deaths of the descendants of Hira and Hamira, and they have done nothing since to forfeit those rights. Those rights they have derived not from their father but through their father from the common ancestor, Mohkam; and their father was not, therefore, in a position to abandon those rights in anticipation of their accrual so as to preclude the plaintiffs from enforcing them. So far as the plaintiffs themselves are concerned, they not only did not abandon their father's land, but did their best to recover possession of it by suit, though it was unfortunate that the result was unfavourable to them.

For the above reasons I must hold that the plaintiffs are entitled to succeed to the land in suit, and accepting the appeal I decree their claim with costs throughout.

Appeal allowed.

No. 42.

Before Mr. Justice Shah Din.

BHAGWANTI,—(DEFENDANT),—APPELLANT,

Versus

GOMAN AND OTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 751 of 1906.

Civil Procedure Code, 1882. Sections 278, 283—Attachment—Application for removal of attachment—Omission of Judge to give decision with respect to a part of the property under attachment—Suit by claimant to establish right regarding the part so omitted—Limitation—Limitation Act, 1877, Schedule II, Article II.

Held that when an executing Court under some misapprehension has omitted in its order to express an opinion or to give judgment on the merits with respect to some of the properties mentioned in the claim preferred by a judgment-debtor under Section 278 of the Code of Civil Procedure, the order cannot be treated regarding those properties as an order within the meaning of Section 283 to which Article 11 of the second Schedule of the Indian Limitation Act would apply.

Miscellaneous further appeal from the order of W. Chervis, Esquire, Divisional Judge, Sialkot Division, dated 30th May 1906.

K. C. Chatterji, for appellant.

Roshan Lal, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—I need not repeat the facts of this case which are fully stated in the judgment of the Lower Appellate Court. The sole question for decision in this appeal is whether the plaintiffs' suit is barred by Article 11 of the second Schedule of the Indian Limitation Act, and this depends upon the determination of the question whether on the 5th November 1901 the executing Court passed an order under Sections 280 and 281 of the Code of Civil Procedure disallowing the claim of the present plaintiff to the property now in suit, which admittedly was covered by the application which she made under Section 278 of the Code objecting to the attachment of part of the property attached in execution of the respondent's decree of the 10th December 1900. A reference to the order of the 5th November shows that the executing Court evidently was under the impression that only one house and a few shops had been attached on the

5th Jan'y. 1907.

application of the decree-holder as being the property of the judgment-debtors, although as a matter of fact the attached property consisted, besides the one house and six shops referred to in the said order, of six houses, four other houses, and one piece of vacant site. Mussammat Goman's application for removal of attachment covered all these properties, but as the Court, as I have just pointed out, believed that only one house and the shops aforesaid were under attachment, and as it held that Mussammat Goman had given satisfactory evidence in support of her position, it ordered the release from attachment of one-sixth of the house and one-third of the shops. The order is naturally silent with regard to the rest of the attached properties. The Lower Appellate Court notes that the property as to which Mussammat Goman had filed an objection, but which was not expressly covered by the order of 5th November 1901, was as a matter of fact released from attachment, and this probably was the case, as we find that Mussammat Goman did not institute a suit under Section 283, Civil Procedure Code, to have her title established to any part of the property covered by her application aforesaid.

The decree-holder brought a suit under Section 283, Civil Procedure Code, as regards the house and the six shops referred to in the order of the 5th November, but she was unsuccessful up to the Appellate Court. Thereafter she again attached the six houses and the vacant site mentioned above upon which Mussammat Goman filed an objection which having been disallowed, the present suit has been instituted by Mussammat Goman under Section 283 of the Code. The decree-holder's defence is that the suit is barred by limitation under Article 11 of the second Schedule of Act XV of 1877, on the ground that the period of one year allowed by that article began to run from 5th November 1901, on which date it is contended an order was passed by the executing Court against the plaintiff (then objector) under Sections 280 and 281 of the Code. This defence was accepted by the first Court which dismissed the suit as barred by limitation, but in appeal the learned Divisional Judge has held the suit not so barred, and has remanded the case for decision on the merits.

After giving my best consideration to the arguments addressed to me by the learned pleader for the appellant, I am of opinion that the conclusion arrived at by the Lower Appellate Court is sound, though my reasons for this decision are not identical with those given by that Court. I think that

Section 13 of the Civil Procedure Code has, as was very properly admitted by Mr. Chatterji, no bearing on the point before me, the determination of which hinges exclusively upon the meaning and scope of the order of 5th November 1901, and upon the applicability, in the light of that order, of Article 11 of Schedule II of the Limitation Act to the facts of this case.

Now, as I have already indicated, the executing Court that passed the order of the 5th November was clearly under the impression, as the order shows, that only one house and a few shops were under attachment, and there can be no doubt to my mind that in allowing the objection of Mussammat Goman to the extent of her interest in those properties, the Court meant to and did allow her objection in full. If the Court had known that there were other properties under attachment and that Mussammat Goman's objection covered those properties as well, there is no reason to suppose that her objection with regard to them would have been disallowed, especially in view of the fact that the evidence on which the Court decided in favour of Mussammat Goman's claim apparently supported that claim to its fullest extent, and not only so far as it related to the one house and the shops actually ordered to be released from attachment. This being the case, can it be said, as was contended by the pleader for the appellant, that the executing Court passed the order in question under Section 280, Civil Procedure Code, only for the partial release of the attached property, *i. e.*, the property expressly mentioned in the order, retaining the attachment as regards the property not so mentioned? I think that this construction of the order is absolutely inadmissible and cannot be accepted. The Court, in my opinion, allowed the release of the entire property so far as Mussammat Goman's interest was concerned, and never meant to retain the attachment as regards the properties now in suit. At any rate, it is clear that no order was passed on the 5th November either under Section 280 or Section 281 disallowing any part of the objector's claim, and if that were so, I fail to see how Article 11 of the second Schedule of the Limitation Act applies to this suit, for that article applies in terms only to a suit by a person against whom an order is passed under Section 280 or Section 281 of the Code of Civil Procedure, to establish his right to the property comprised in the order. The order of 5th November was not in my opinion an order passed against Mussammat Goman either under Section 280 or Section 281 of the Code

with regard to "any property comprised in that order," and as there is admittedly no other order on the execution file of 1901 comprising the property in suit, *viz.*, one-third of six houses and a vacant site, it is clear that limitation cannot run against the plaintiff from any date in that year.

No published decision of an Indian Court exactly in point has been brought to my notice, nor have I been able to discover any, but I think that the ruling of this Court in *Sajan Ram v. Ram Rattan and another* ⁽¹⁾ is, so far as it goes, in favour of the plaintiff's position, inasmuch as the executing Court in 1901 did not in the words of that ruling "express an opinion and give judgment on the merits" as regards Mussammatt Goman's objection relating to the property which is the subject matter of the present litigation.

For the above reasons I am of opinion that the order of the Lower Appellate Court is correct, and I dismiss this appeal with costs.

Appeal dismissed.

No. 43.

Before Mr. Justice Shah Din.

KURI MAL,—APPELLANT;

Versus

BHANA MAL,—RESPONDENT.

Civil Appeal No. 290 of 1907.

Guardian and Wards Act, 1890, Section 7—Guardian of property—Power of Court to appoint guardian to the property of a minor who is a member of joint Hindu family.

Held that it is not competent to a Court to appoint a guardian of the property of a minor who is a member of a joint Hindu family.

Miscellaneous first appeal from the order of T. P. Ellis, Esquire, District Judge, Delhi, dated 19th January 1907.

Shadi Lal and Chuni Lal, for appellant.

Pestonji Dadabhai, for respondent.

APPELLATE SIDE. }

• The judgment of the learned Judge was as follows :—

SHAH DIN, J.—After hearing the counsel for the parties and 18th May 1907.
referring to the record, I think that the learned District Judge should not have appointed the respondent guardian of the person and property of the minor without making a fuller enquiry than appears to have been made by him into the circumstances of the case, with special reference to the considerations specified in Section 17 of Act VIII of 1890.

It also seems to me that the appellant ought to have been given an opportunity to prove that he was prevented by sufficient cause from attending the Court when the case was called on for hearing on the 19th January 1907. If sufficient cause for his non-attendance could have been made out by him, the appellant was entitled, it appears to me, to have his objections to the appointment of the respondent as guardian of the minor heard, and to adduce evidence under Section 13 of the Act in opposition to the respondent's application. The appellant is an agnate of the minor, and as the latter has been living with him ever since the death of his (the minor's father, the appellant has *prima facie* a better right to be appointed guardian of the person of the minor than the respondent, who is not a member of the family, being the minor's father's sister's son. The minor is about 10 years old and appears to be an intelligent boy. On questioning him I find that he prefers to remain where he is, and his preference in a matter like this may well be taken into consideration by the District Judge.

Next as regards the appointment of the respondent as guardian of the property of the minor, it is contended by the learned counsel for the appellant that the minor is a member of a joint Hindu family, and that the property being joint and undivided, the Lower Court was not competent to appoint any person guardian of the minor's interest in that property. In support of that contention, reliance is placed upon the decision of their Lordships of the Privy Council in *Gharibullah v. Khalak Singh* (1) especially on the passage at page 416, which runs as follows:—

“It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family.” And in their Lordships' opinion “those decisions are clearly right, on the plain

(1) I. L. R., XXV All., 407.

“ground that the interest of a member of such family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property.” To the same effect is the recent ruling of the Bombay High Court in *Bindaji Laxuman Triputikar v. Mathurabai* (1).

With regard to the question whether the property under consideration is or is not joint family property in which the minor is interested as a co-parcener, the application made by the appellant on 3rd February 1906 contains a specific allegation that the property is joint property, and if he is in a position to prove that allegation (as it is seriously contended he is) an opportunity should be allowed him to do so.

I accordingly set aside the order of the District Judge appointing the respondent guardian of the person and property of the minor, and send the case back for re-decision with reference to the foregoing remarks.

I make no order as to costs.

Appeal allowed.

No. 44.

Before Sir William Clark, Kt., Chief Judge, and Mr. Justice Reid.

SAWAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SAHIB KHATUN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE. {

Civil Appeal No. 825 of 1907.

Custom—Inheritance—Sister succeeds in preference to collaterals—Panwars of mauza Bhotapir, tahsil Muzaffargarh.

Found, that among Panwars of mauza Bhotapir, tahsil Muzaffargarh, a sister succeeds to the ancestral property of a deceased proprietor in preference to his collaterals in the fifth degree.

Further appeal from the decree of Shaikh Asghar Ali, Additional Divisional Judge, Multan Division, dated 26th April 1907.

Muhammad Shafi, for appellants.

Shadi Lal and Rajindar Parshad, for respondents.

The judgment of the Court was delivered by—

CLARK, C. J.—A pedigree table is attached which shows 23rd Decr. 1908. the family as far as it is necessary for the understanding of the case.

There are two lots of property in dispute—one lot, which Mussammat Sahib Khatun inherited from her father and the other which she inherited from her son, Hayat Muhammad.

As regards the former lot, plaintiff, before the Divisional Judge, admitted Mussammat Sahib Khatun's right to do what she liked with it, and this is sufficient as regards that lot.

As regards the second lot, the main question is whether, according to the custom of the parties, a sister succeeds to ancestral property in preference to a collateral in the fifth degree from Hayat Muhammad.

The parties are *Panwars* of *mauza Bhotapir tahsil* and District Muzaffargarh. Mussammat Hayat Khatun married a *Panwar* but not a collateral, this does not seem to have much bearing on the case.

The entry in the *Riwaj-i-am* is in favour of the sister.

In *Alam v. Nur* ⁽¹⁾ which was also a case of *Jats* of the Muzaffargarh District weight was given to the entry in the *Riwaj-i-am* as affecting the *onus probandi*, and it was held that a daughter, by custom, could gift property inherited from her father to a stranger. *Mussammat Fatima v. Khanda* ⁽²⁾ was a case of *Ganga Jats* of the Muzaffargarh District and the *Riwaj-i-am* is there discussed, and the view was taken that daughters succeeded in preference to collaterals when they married a man of their own *khândân* but not when the daughter married a stranger.

We have referred to a number of other Chief Court rulings, which have been quoted, but they do not help us much.

We have also carefully considered the precedents referred to in this case, and we think that there are a considerable number of instances of succession of sisters in preference to collaterals. The judicial cases relied upon by plaintiffs to support the case of collaterals do not stand analysis.

We think that it is quite clear that daughters exclude collaterals in this tribe, there was the case of Mussammat

⁽¹⁾ 62 P. E., 1905.

⁽²⁾ 25 P. E., 1895.

Sahib Khatun herself inheriting from her father, and it was admitted by Sawan, plaintiff, in the First Court provided the daughter married in the same caste (page 6, line 3, of paper book), and this makes it probable that there should be an extension in favour of sisters.

Another instance in the family is that of Hayat Muhammad, on whose death Mussammatt Sahib Khatun, and not the collaterals, succeeded. It is true that according to *Riwaj-i-am* the sister should have come before the mother, but this is not of much account—the important fact is that the collateral were excluded.

We hold, then, that sisters and their sons exclude collaterals and the gift in this case was only an acceleration of the succession. We dismiss the appeal with costs.

Appeal dismissed.

No. 45.

Before Sir William Clark, Kt., Chief Judge.

MUL CHAND,—(PLAINTIFF),—PETITIONER,

Versus.

MUHAMMAD,—(DEFENDANT),—RESPONDENT.

REVISION SIDE. }

Civil Revision No. 2137 of 1907.

Execution of decree—Release of property—Suit by decree-holder to establish right to attached property—Step in aid of execution—Revival of previous application—Limitation Act, 1877, Article 179 (4)—Revision—Material irregularity—Punjab Courts Act, 1884, Section 70 (1) (a).

Held, that where execution proceedings had been so obstructed that the decree-holder, through no fault of his own, was prevented from proceeding against the property attached, a subsequent application by him for execution against the same property after the removal of the obstruction must be treated as a continuance of his former application.

Held also, that misapplication of a ruling is material irregularity within the meaning of Section 70 (1) (a) of the Punjab Courts Act, 1884.

Petition for revision of the order of Lala Chuni Lal, Additional Divisional Judge, Shahpur Division, dated 15th July 1907.

Roshan Lal, for petitioner.

The judgment of the learned Chief Judge was as follows:—

19th Novr. 1908.

CLARK, C. J.—On 19th December 1902 plaintiff obtained a decree for Rs. 107, chargeable on the house in dispute.

On 13th January 1903, plaintiff applied for execution. Objectors arose to the attachment of the house, and Fattah Sher's objection was successful as regards the site of the house: plaintiff's execution, therefore, was blocked, and he let it go by default on 12th June 1903, and he instituted a suit to establish his right to have the house sold in execution of his decree.

On 25th April 1905, plaintiff's suit was dismissed.

On 11th December 1905, on appeal it was decreed.

On 19th December 1906, the Chief Court dismissed Fattah Sher's appeal and maintained the decree in plaintiff's favour.

On 9th February 1907 plaintiff applied for execution.

Plaintiff then has prosecuted his execution of decree with due diligence: it was only reasonable that he should stay his hand until the appeal had been finally disposed of by the Chief Court: if he had not done so, no doubt he would have been ordered to do so by the Court on application by Fattah Sher. *Mihir Jang Khan v. Faizulla Khan* ⁽¹⁾ is distinguishable, it does not appear that there was in that case any charge made by the decree on the house attached, and the objection of the decree-holder was dismissed, and his suit was also dismissed, so there had been no block to the decree-holder proceeding with his decree. The delay also was inordinate, the objector's suit had been dismissed on 31st May 1886, and the application for execution was not made till 14th March 1889.

Desraj Singh v. Karam Khan ⁽²⁾ is really in favour of plaintiff, not against, as the First Court thought.

The application was held barred there, because it was made more than three years after plaintiff obtained a decree under Section 283, Civil Procedure Code, the inference being that the point from which limitation should run is the point at which the execution ceased to be blocked.

Gurudeo Nardyan Sinha v. Amrit Narayan Sinha ⁽³⁾ seems to me to disclose the correct way to regard the application of 9th February 1907, namely, as a continuation of the former application of 13th January 1903, which had been blocked through no fault of the plaintiff, who was diligently trying to remove the block.

(1) 154 P. R., 1890.

(2) I. L. R., XIX All., 71.

(3) I. L. R., XXXIII Calc., 689.

I find the application to be within time, and set aside the orders of the Lower Courts with costs—pleader's fee Rs. 10. The material irregularity in this case, which admits its treatment as a revision, is that the Divisional Judge basing his decision on *Mihr Jang Khan v. Faizulla Khan* (1) mis-applied that ruling by imperfectly understanding the difference between that case and this case.

Application allowed.

No. 46.

*Before Sir William Clark, Kt., Chief Judge, and
Mr. Justice Reid.*

PIARE LAL,—(PLAINTIFF),—APPELLANT,

Versus

GANESHI LAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 707 of 1907.

Pre-emption—Sale of immovable property by a receiver under Section 356, Civil Procedure Code, is not subject to pre-emption—Punjab Pre-emption Act, 1905, Section 3 (5).

Held, that a sale of immovable property by a receiver, under direction of the Court, under Section 356 of the Code of Civil Procedure, is a sale in execution of an order of a Civil Court within the terms of Section 3 (5) of the Punjab Pre-emption Act, 1905, and consequently not subject to pre-emption.

*Further appeal from the decree of A. E. Martineau, Esquire,
Divisional Judge, Delhi Division, dated 25th March 1907.*

Muhammad Shafi and Shah Nawaz, for appellant.

Shadi Lal, for respondents.

The judgment of the Court was delivered by—

27th Novr. 1908.

REID, J.—The sole question for consideration is whether a sale of immoveable property by a receiver under "direction of the Court," under Section 356 of the Code of Civil Procedure, is a sale in execution of an order of a Civil Court within the terms of Section 3 (5) of the Punjab Pre-emption Act, and consequently, not subject to pre-emption.

(1) 154 P. R., 1890.

The Lower Appellate Court has dissented from the decision of the Court of first instance, that the word "order" in Section 3 (5) is limited to the definition contained in Section 2 of the Code, and has pointed out that orders of Civil, Criminal and Revenue Courts and of revenue officers are accepted from pre-emption by the sub-section, and that an order passed by a Criminal Court cannot be limited by the definition in the Code.

This argument is not conclusive, inasmuch as an "order" of a Civil Court might be defined by the Code of Civil, and an "order" of a Criminal Court by the Code of Criminal, Procedure, but the fact remains that the definition was expressly enacted for the purpose of the Code itself, the words used being "In this act unless there be something repugnant in the subject or context.....order means the formal expression of any decision of a Civil Court which is not a decree as above defined."

The Lower Appellate Court further held, on authority cited, that a special definition contained in one Act should not be read into another, and that the sale was not subject to pre-emption. Counsel for the appellant cited a mass of authorities, which have not, in our opinion, supported his contention that Section 3 (5) of the Pre-emption Act does not affect the right to pre-emption claimed.

The most relevant of these are :—

(1). *Wells v. London, Tilbury and Southend Railway Company* (1) at page 130, of which Bramwell, J. A., said, "I agree that we ought to construe the Act of Parliament according to the fair meaning of the words, even supposing the true construction of the Act does an injustice to the parties. But we may well approach the construction of an Act of Parliament of this kind" (extinguishing certain rights of way across a railway line) "in the belief that it was not intended to confiscate a private right."

(2). Maxwell on the Interpretation of Statutes, Edition 4, page 334, "where the language of a statute in its ordinary meaning and grammatical construction leads to hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words."

(3). Page 770 of the report of *Muhammad Wahid-ud-Din v. Hakimian* (2), where it is said "In ascertaining that meaning" (of Section 525 and Section 526 of the Code of Civil Procedure)

(1) *L. R.*, 5 *Ch. Dn.* 127.

(2) *I. L. R.*, XXV *Calc.*, 767, *F. B.*

“ we must look not merely to the letter but to the spirit of the law, and must also, as far as possible, have regard to the interpretation put by previous decisions upon these and other cognate provisions of the law.”

(4). Certain remarks by Mahmud, J., at page 228 of the report of *Baij Nath v. Sital Singh*, ⁽¹⁾, on the considerations which appeared sufficient to render the ordinary law of pre-emption inapplicable to public auction in execution of decrees.

(5). *Mahomed Bakhsh v. Hira* ⁽²⁾, in which it was held that omission to take advantage of the opportunity he had of attending an auction-sale, and there asserting his rights as pre-emptor constituted a relinquishment of the plaintiff's right of pre-emption.

(6). *Mula v. Nihal Ohand* ⁽³⁾, in which it was held that failure to attend and bid at an auction, in the absence of notice under Section 13 of the Laws Act, was not a waiver of the right of pre-emption.

(7). *Muhammad Bakhsh v. Sardar Rajindar Singh* ⁽⁴⁾, in which it was held that a plaintiff having a right of pre-emption does not lose it by omitting to bid at a sale in execution of a decree.

(8). Page 276 of the report of *Jhungi Ram v. Mussammat Budho Bai* ⁽⁵⁾, in which Clark, C. J., said, “ granting that the plain meaning of the words of an Act must be followed, it is beyond the capacity of human intelligence to foresee and provide in a statute for all the complications and contingencies that may arise, it is equally beyond the capacity of human language to express its intention so as to make misunderstanding impossible.

“ It is within the functions of the Courts to bring a liberal mind to the construction of a statute where it has to be applied to an unforeseen contingency or where the bold literal meaning and the spirit of the statute are at variance.

“ An absolutely literal reading of Section 526 would lead to the absurd conclusion that the award *must be filed*, where an objection has been taken that there has been no reference and no award, these not being objections under Sections 520 and 521, and is impossible.

“ When two meanings are possible, and one brings about a result opposed to the other provisions and spirit of the statute, and the other brings about a result in accordance with those

⁽¹⁾ *I. L. R.*, XIII *ALL.*, 224, *F. B.* ⁽³⁾ 78 *P. R.*, 1881.

⁽²⁾ 47 *P. R.*, 1873. ⁽⁴⁾ 121 *P. R.*, 1888.

⁽⁵⁾ 84 *P. R.*, *F. B.*, 1901.

"provisions and the spirit of the act, courts are justified in adopting the former meaning, even though the latter meaning is, on the face of it, the more plain of the two."

(9). *Jagan Nath v. Fazla* ⁽¹⁾, to the same effect reliance was also placed on Section 286, *et. seq.*, of the Code, prescribing the manner of conducting sales in execution of decree, and on the fact that Sections 88, 140, 386, 514 and 524 of the Code of Criminal Procedure empower Criminal Courts to sell property, and it was contended that the object of Section 3 (5) of the Pre-emption Act was to amend Section 9 of the Punjab Laws Act, which extended the right of pre-emption to "sales whether under a decree or otherwise," and that the amendment extended only to excluding sales under a decree from pre-emption.

It was further contended that the property of the insolvent vested in the receiver under Section 354 of the Code, the proceedings being under Chapter XX of the Code, not under the Laws Act, and that the sale was by the receiver, not by the Court.

Counsel for the respondents contended that the sale, being under the direction of the Court, was by order of the Court, and pointed out that on the 17th May 1905 the Court passed an order that Gopal Das do pay the money bid by him and that a sale-deed be executed, the sale becoming complete by express order of the Court.

Reliance was placed on the fact that Section 352 of the Code makes an order under Section 351 a decree, and that subsequent orders are orders in execution of a decree, and the sale, a sale in execution within the terms of Chapter XIX of the Code.

The authorities cited for the respondent were—

(1) *Narendra Nath Sircar v. Kamal Basini Dasni* ⁽²⁾, in which their Lordships followed the rule laid down by Lord Herschell in *Bank of England v. Vaglianis* ⁽³⁾, that, if, dealing with an Act intended to codify a particular branch of the law, the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood and

⁽¹⁾ 26 P. R., 1902.

⁽²⁾ I. L. R., XXIII Calc., 563. P. O.

⁽³⁾ 1891, A. O., 107.

then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Lord Herschell added : " If a statute, intended to embody " in a Code a particular branch of the law, is to be treated " in this fashion, it appears to me that its utility will be almost " entirely destroyed, and the very object with which it was " enacted will be frustrated. The purpose of such a statute " surely was that, on any point specifically dealt with by it, " the law should be ascertained by interpreting the language " used instead of, as before, roaming over a vast number of " authorities in order to discover what the law was, extracting " it by a minute critical examination of the prior decisions."

(²) *Hukam Chand v. Robinson* (¹), in which it was held that an order under Section 358 of the Code, declaring the insolvent absolved from all further liability, was a decree, proceedings under Chapter XX of the Code being proceedings in a suit.

Reference under Section 28, Act VII of 1870 (²), in which it was held that an order under Section 214 of Act VI of 1882 (Companies Act) is not a decree or an order having the force of a decree, and that an appeal from such an order to a High Court is properly stamped with a Court-fee of Rs. 2.

Section 214 empowers a Court to compel a Director, Manager, or other officer of a Company in liquidation to repay money, misapplied or retained, with interest. Burkitt, J. whose judgment is cited, doubted whether any order, in the strict sense of the word, as defined in the Code of Civil Procedure, is passed by the winding-up Court under that section which appeared to him to be the complement of Sections 162, *et. seq.*, of the Act, and that the Act did not contemplate an order by way of formal adjudication upon a matter of right, but authorised a compulsory, or executive, order.

Section 169 provides that appeals from any order or decision made or given^{tr} in the matter of the winding-up of a company by a Court may be had in the same manner in which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction, and it does not appear that it was ever contended that an order under Section 214 is not appealable. On the contrary, such appeals have been freely admitted.

(¹) 43 P. R., 1684.

(²) I. L. R., XVII All., 238.

Although, as stated at page 90 of Maxwell on the Interpretation of Statutes, Edition 4, it is a canon of interpretation that all words, if they be general and not express or precise, are to be restricted to the fitness of the matter and are to be construed as particular if the intention be particular, and understood as used in reference to the subject-matter in the mind of the legislature, and strictly limited to it, the authorities do not, in our opinion, justify the limitation of the word "order" in Section 3 (5) within the four corners of the definition in Section 2 of the Code, or the importation, in construing Section 3 (5), of any consideration of the expediency of excluding sales by public auction only from the provisions of the Pre-emption Act. We cannot assume that the legislature intended to adopt the principles enunciated by Mahmud, J., in the case of *Brij Nath* (1), or assume that the language of the sub-section was used carelessly or without due regard to its obvious interpretation.

Had the intention been to exclude only sales in execution of decrees of Civil Courts, and not sales in execution of orders of Civil Courts, the Act would presumably have contained a specific and unmistakeable provision to that effect, and the argument based on the dictum in the *Wells'* case (2), that it must not be presumed that the legislature intended to confiscate rights of pre-emption is met by the reply that the sub-section admittedly deprived pre-emptors of their existing right in respect of sales in execution of decrees, and it cannot be assumed, in the face of the language of the sub-section, that the intention was to preserve the right in respect of other sales by order of a Civil Court.

The words "in execution of an order" are, in our opinion, synonymous with "in compliance with an order," or in obedience "to an order."

The sale being under the direction of the Court, the receiver acted in obedience to the order of the Court; and as already stated, the Court ordered that the purchaser should deposit the purchase-money, and that a sale-deed should be prepared, after having ordered the receiver, on the 7th April 1905, to discover a purchaser. The whole proceeding was under the specific orders of the Court, and we have no hesitation, interpreting the language of the sub-section in accordance with the

(1) *I. L. R.*, XIII All., 224.(2) *I. L. R.*, V Ch. Dn. 127.

rules of interpretation above cited, in holding that the sale was not subject to pre-emption.

In our view of the language of the sub-section it is unnecessary to deal with the argument of Counsel for the respondents that the order of the Insolvency Court was a decree.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

No. 47.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

HOA RAM,—(DEFENDANT),—APPELLANT,

Versus

RANA PALIA,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 390 of 1907.

APPELLATE SIDE. }

Pre-emption—Purchase money—Good faith—Punjab Pre-emption Act, 1905, Section 22.

Held. that the price entered in a deed of sale is fixed in good faith within the terms of Section 22 of the Pre-emption Act, if it is actually paid for the property sold, but in the case of a transfer in satisfaction of old debts, it is for the Court to find out whether the actual value of the debts amounted to its face value or not, and in case of its arriving to the latter conclusion it should ascertain the market value of the property.

First appeal from the decree of Lala Tikkan Lal, District Judge, Multan, dated 27th July 1906.

Muhammad Shafi, for appellant.

Shah Nawaz, for respondent.

The judgment of the Court was delivered by—

17th Decr. 1908.

ROBERTSON, J.—This is a suit for pre-emption. The right to pre-empt is not denied, only the price is in question.

The sum entered in the sale-deed is Rs. 7,200. This is made up of old debts, all of which were admittedly due as follows:—

	Rs.	a.	p.
Actual cash paid ...	3,956	2	0
Interest and lease-money ...	3,003	15	0
Compound interest ...	200	14	0
	7,200	0	0

and the conveyance of the land wiped out the whole debt, which formed the consideration for the sale.

In regard to this the District Judge makes a remark which involves a misconception which, we fear, is not confined to him. It is unfortunately given expression to in the Commentary on the Pre-emption Act published by Mr. Shadi Lal. The District Judge remarks: "I hold Rs. 7,200 "not fixed in good faith as nearly half the price entered "in the deed consists of lease-money and its interest." Now as to this we entirely concur in the views expressed by a Division Bench of this Court in *Vir Bhan v. Mattu Shah* (1), which are as follows:—

"There appears to us to be no doubt that the price was "fixed in good faith as between the parties, *i. e.*, the price "actually paid was the cancellation of all the liabilities "quoted in the deed, and we may remark that we do not see "that when a creditor agreed to accept land in payment of "previous debts of whatever amount, that it can be said that "the price is fixed otherwise than in good faith if the creditor "really and *bonâ fide* accepts the transfer of the land, in full "discharge of the transferor's liabilities. But we are not "at variance with the views expressed by a Division Bench "of this Court in *Baksha v. Karm and Dharma*, Civil Appeal "No. 585 of 1890, in which it was pointed out that the "arithmetical total of the previous debts might not be the "actual measure of the consideration paid. In that case "the sum due was far in excess of the value of the land "transferred in satisfaction of the liability, and it was held "that the sum paid was the value of the debt, not its "arithmetical total; and it was held as a corollary that the "market value of the land was the obvious test of the value "of the consideration paid."

See also *Niadar Mal v. Mukh Ram* (2).

Put briefly, the sale is made in good faith if the consideration entered in the sale deed is actually paid for the land in question without any intention of subsequent modification of the bargain. It is quite immaterial whether or not the sum is largely in excess of the market-value, even if the vendee's object in giving so high a price is to stave off a claim to pre-emption. If it is his fancy to pay a price which he is prepared to pay for reasons of his own, he is perfectly entitled to do so, and the vendor is certainly entitled to get the best price he can for his land. The sole test of "good faith" under the Act is

(1) 77 P. R., 1901.

(2) 13 P. R., 1908.

that the money which is alleged to have been paid shall have been paid finally, and the bargain concluded and maintained without subsequent modification or diminution in the price by return of a portion of the purchase-money or otherwise.

This being so, and the finding of the Lower Court, which is not seriously disputed here, being that the Rs. 7,200 was actually due and legally claimable from the vendor, we cannot say that the fixing of the consideration at the value of the debts, whose arithmetical total was 7,200, was in itself an act of bad faith.

But, at the same time, we have to consider whether the actual value of the debt of Rs. 7,200 amounted to its face value or not, and upon this point we must agree with the District Judge that it does not. The debt was largely made up of interest. The Commissioner has made a most careful enquiry, and though we cannot think that his apportionment of value by which he allows uncultivated land to be reckoned at half the value of the cultivated land is justifiable, we think that the total arrived at is as correct an estimate as it is possible to make. The test applied in *Bhan v. Mattu Shah* ⁽¹⁾, as a very rough guide, *i. e.*, the total of so many years' revenue is totally inapplicable to cases of this kind, in which the lands are irrigated by canals and separate payments made for the water used. In such cases the "dry" revenue paid is no guide at all.

There has been an omission by accident of some 40 *kanals* of land from the calculation. For this, which is admittedly good land, we think another Rs. 400 must be allowed; this brings the total up to Rs. 6,000.

We consider, therefore, that the price actually paid must be taken to be Rs. 6,000 which is what the vendee valued his debts inasmuch as he accepted in full discharge of that debt land of which the market value was about that amount.

We do not think it necessary or desirable to offer him the option contemplated by the latter part of Section 22 of the Pre-emption Act, but we give a decree for pre-emption in favour of the plaintiff, on payment of Rs. 6,000 within two months of the date of this judgment. Each party will bear their own costs throughout.

(¹) 17 P. R., 1901.

No. 48.

Before Sir William Clark, Kt., Chief Judge, and Mr.
Justice Reid.

ALLAH DITTA AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

BEG,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 445 of 1904.

Custom—Alienation—Gift and will in favour of daughter or daughter's son—Muhammadan Dab Jats of Jhang District.

Found that the defendant failed to prove that among Muhammadan Dab Jats of Jhang District, a sonless male proprietor is competent to transfer, either by gift or will, ancestral immoveable property to a daughter or daughter's son, or that the daughter or daughter's son was entitled to succeed in preference to the first-cousins once-removed of the deceased.

Further appeal from the decree of Khan Abdul Ghafur Khan, Divisional Judge, Shahpur Division, dated 3rd February 1904.

Shadi Lal and Bahadar Chand, for appellants.

Muhammad Shafi and Lal Chand, for respondent.

The judgment of the Court was delivered by

REID, J.—This appeal and 430 of 1905 can be disposed 23rd Decr. 1908. of together.

The issues for decision are those remanded in our order of the 16th November 1905, which will be read with this judgment.

The first issue is whether the property in suit, consisting of *bindi* or *nria baramad* land and five wells out of six, is ancestral or self-acquired. The Courts below have recorded cogent reasons, in which we concur, for holding that this property was ancestral in the hands of Shahamad, father of Mussammatt Jindwadi, mother of the defendant-respondent Beg. The evidence on this issue has been dealt with so fully by the Courts below that it is unnecessary for us to do more than record our concurrence in the finding.

The share in the Doriwala well, the sixth, was admittedly self-acquired in the hands of Shahamad, and it has been admitted that he could dispose thereof in favour of his daughter's son, by the will which we have found to be genuine.

The second issue remanded, whether Shahamad had power to give his ancestral property to the respondent, son of his daughter, and his first-cousin-once-removed and *khana-imad*, is the next for decision.

A mass of authority and of instances, considered in detail by the Courts below on remand, has been cited, and counsel for the respondent has asked us to hold that the parties, Muhammadan Jats of the Dab tribe, resident in the Jhang District, are governed by the custom prevailing among Syals, Sheiks and Biluchis in that district.

We are unable to accept this contention. Muhammadan Jats resident in the central districts of the Punjab are ordinarily governed by the customary law of the agricultural tribes of the Central Punjab, and the Jhang District is not so far west as to induce us to hold that a special custom, following Muhammadan Law and at variance with the general custom, need not be strictly proved by cogent evidence, and may be inferred from customs governing other tribes in the neighbourhood.

The Syals were for many years the ruling race, and there are obvious reasons for Sheiks, Biluchis and Syals modifying the general custom by the Muhammadan Law of inheritance. The Syal rulers were descended from a Panwar Rajput resident in the Allahabad Division, whose ancestor had migrated from Rajputana.

They would, therefore, naturally follow Muhammadan Law in the first instance, and any custom adopted by them would be considerably influenced by that law. Sheiks and Biluchis would be equally influenced by the Muhammadan Law of the country of their origin.

Even so, it was held in *Mussammat Sahban v. Ghazi* ⁽¹⁾ that no custom, allowing daughters of Muhammadan Syals of the Jhang District to succeed in preference to male collaterals, had been established; in *Mussammat Emma v. Sajawal Khan* ⁽²⁾ it was held that such custom had not been established among Subzani Lund Biluchis of the Dera Ghazi Khan District, and it was further held that the mere fact that the daughter had married in the tribe and was in actual possession of her father's land gave her no right in preference to collaterals, and in *Malik Nur v. Aishan* ⁽³⁾ it was held that a custom

⁽¹⁾ 50 P. R., 1885.

⁽²⁾ 37 P. R., 1898.

⁽³⁾ 105 P. R., 1906.

entitling a Muhammadan Jat daughter in *tahsil* Leiah, Dera Ghazi Khan, to exclude near collaterals of her father from his estate had not been proved.

It is true that the Dab Jat tribe is endogamous, and that a stranger is not introduced into the village by allowing the son of the daughter and a near collateral to inherit, but the rights of the collaterals must be considered from points of view other than that of the introduction of a stranger.

In favour of the respondent are the *Riwaj-i-am* and two rulings, i.e., *Mussammât Fatima v. Khanda* ⁽¹⁾ and *Sheran v. Mussammât Sharman* ⁽²⁾. In the former it was held incidentally that, among Ganga Jats of Muzaffargarh, a daughter married to a member of the family succeeded in preference to collaterals; and in the latter it was held that the rules of inheritance detailed in the *Riwaj-i-am* of a *tahsil* were sufficient to shift the burden of proof from a sister claiming against collaterals, and that the collaterals, having failed to establish a custom by which they descended from the great-great-grandfather of the deceased, were entitled to his land in preference to his sister, or any other custom regulating their rights, Muhammadan Law must be followed. In the case before us the plaintiffs are first-cousins, and first-cousins-once-removed, of the deceased. Only one instance, of any value, of a Dab Jat daughter succeeding in preference to near collaterals has been cited.

Had the custom set up by the respondent governed the tribe, we should doubtless have found more instances forthcoming, and in *Hayat Muhammad v. Nawab* ⁽³⁾, *Allah Ditta v. Allah Buksh* ⁽⁴⁾, and *Nizam Din v. Shahab-ud-din* ⁽⁵⁾, four Judges of this Court held that an entry in the *Riwaj-i-am*, unsupported by instances, does not justify modification of the ordinary custom.

It is by no means unusual to find representatives of tribes, when examined by a Settlement Officer, merely concurring in the answers given by representatives of other tribes, and answers must be supported by instances to be of any value. Far from the tendency in the districts bordering Jhang being to put Muhammadan Jats on the footing of other Muhammadan tribes in matters of female inheritance, the claims of daughters against near collaterals have frequently failed and the attempt to establish the special custom set up by the respondent has signally failed.

⁽¹⁾ 25 P. R., 1895.

⁽³⁾ 29 P. R., 1900.

⁽²⁾ 117 P. R., 1901.

⁽⁴⁾ 89 P. R., 1900.

⁽⁵⁾ 108 P. R., 1900.

No distinction between will, gift, and inheritance has been established, and we concur with the Courts below on remand in finding against the respondent on the second issue. Inability to give or bequeath to a married daughter admittedly entailed inability to give or bequeath to that daughter's son.

On the third issue, as remarked by the Lower Appellate Court, there was no gift to the *khanadamad*, and no special custom entitling him to the property in suit has been established, and the issue must be decided against the respondent.

We decree the appeal and the suit of the plaintiff-appellants, except as to the Doriwala well which is of small value and was not claimed at the hearing.

The respondent will pay the costs of the appellants of all Courts.

Appeal allowed.

No. 49.

Before Mr. Justice Johnstone.

APPELLATE SIDE.

{ CHANDA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,
Versus
AKBAR AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 266 of 1907.

Custom—Adoption—Adoption of a distant married collateral in presence of near collateral—Lohars of tahsil Amritsar.

Found that among Lohars of tahsil Amritsar the adoption at the age of 26 of a married man, with children, is not invalid by custom.

Further appeal from the decree of Captain B. O. Roe, Additional Divisional Judge, Amritsar Division, dated 9th February 1907.

Morrison, for appellants.

Ram Bhaj Dat, for respondents.

The judgment of the learned Judge was as follows:—

15th July 1907.

JOHNSTONE, J.—On 18th January 1906 defendant executed in favour of defendant 2, a distant kinsman, a deed of gift of his land and house. In it the executant states that he has adopted defendant 2 as his son, and has done all the requisite ceremonies (*rasumat*), and he stipulates that defendant 2 shall serve him and look after him and allow him

Rs. 5 per mensem till his death. Plaintiffs, who are collaterals of defendant 1, and are more nearly related to him than defendant 2 is, have sued for a declaration that this deed shall not affect their rights after the death of defendant 1. They denied the *factum* and the validity of the adoption. Both defendants resisted the claim, saying the adoption took place when defendant 2 was about 5 years of age, that defendant 1 arranged for defendant 2's marriage, that defendant 2 has always rendered service like a son, and that defendant 1 has always treated him as such. These pleadings are in the plaint and the written pleas; but when the parties were orally examined, they both altered their positions. Plaintiffs admitted the *factum* of the adoption as taking place in January 1906, while both defendants said that while the actual adoption took place then, defendant 2 had been doing services and had been treated as a son for 25 years.

Defendants' witnesses examined in Court said actual adoption took place when defendant 2, who was 26 years of age when the suit began, was a small child. Thus they contradict the defendants themselves. In short, we must take it as settled that, whatever had been going on between the defendants in previous years, actual adoption or appointment as heir did not take place until January 1906. It has been held, and is quite clear, that mere bringing up of a boy and arranging for his marriage do not make him heir.

The local commissioner found that there was no real adoption at all, that among these Lohars the adoption of a married man (with children) at the age of 26 was contrary to custom, or rather was not supported by instances, that defendant 2 has never been treated as a son, has not lived with defendant 1, or even in the village; and so forth. The First Court agreed with the local commissioner, and gave plaintiffs a decree. The learned Divisional Judge, however, held that the main point was that defendant 1 had actually come into Court and stated his intention to appoint defendant 2 his heir; that this, being a clear expression of intention, was sufficient to prove the *factum* of adoption; that defendant 2, being a collateral, could not be said not to be a fit and proper person to be adopted; and that therefore the suit must fail.

Plaintiffs have filed a further appeal here, and I have heard arguments. No instances are forthcoming of the adoption of a man as old as 26 or of the adoption of a married man.

In these circumstances, inasmuch as these Lohars are landowners and said to follow Jat custom, and the *Riwaj-i-am* of 1893 lays it down that the boy to be adopted must be unmarried and must be between 5 and 15 years of age, there is a good deal to be said against the adoption.

But an Amritsar case published as *Nidhana v. Shaman* ⁽¹⁾, in which the parties were Jats, has been quoted as showing that the adoption of a collateral in the presence of nearer collateral is not invalid, though the *Riwaj-i-am* of 1865 lays it down that among collaterals the nearest should be adopted. This rule was held to be indicatory and not mandatory, because it could not be right that a sonless man should be tied down to adopting an individual he might not approve of as a son. It is argued that in the present case also the rule as to the boy being unmarried and under 15 is also indicatory and not mandatory; and the argument is strengthened by a reference to *Budh Singh v. Mula Singh* ⁽²⁾, a Gardaspur case, in which the adopted one was 20 years of age at least, and in which it was ruled that the restrictions as to age, &c., of adoptees to be found in the *Riwaj-i-am* were merely recommendatory. Again, in Section 36 of Rattigan's Digest it is written that there are no restrictions as regards the age or the degree of relationship of the person to be adopted; and many authorities are quoted. I think, then, it may be safely taken that among these Lohars a kinsman of any age may be adopted even in presence of a nearer kinsman.

As regards defendant 2 being a married man, this would certainly be an obstacle were the tribe one in which adoption was a religious act. But it is among these people a purely secular act with no religious connotations, and, therefore, I am unable to see why defendant 2's married condition should make any difference.

Lastly, I note that the adoptor here is a comparatively young man and apparently in good health, and so the case is not one of "paper adoption," made when the adoptor is very old or in *extremis*, in order to deprive the legal heirs of their rights.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

⁽¹⁾ 7 P. L. R., 1907.

⁽²⁾ 40 P. R., 1905.

No. 50.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

AHMAD AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

HAJI MAHMUD,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1021 of 1906.

Custom—Inheritance—Pagvand or chundavand—Sials of Jhang District—Alienation—Gift to one son in excess of his share—Equalisation of shares.

Found, in a suit the parties to which were Sials of the Jhang District, that they were governed by the *pagvand* and not by the *chundavand* rule of succession.

Held that a gift of land to one son in excess of his ordinary share effected by a father in order to equalise the shares of his sons is not ordinarily void.

First appeal from the decree of Pandit Joti Pershad, District Judge, Jhang, dated 30th June 1906.

Grey, for appellants.

Muhammad Shafi, for respondent.

The judgment of the Court so far as is material for this report was delivered by

JOHNSTONE, J.—The suit here is by one Haji Mahmud, son of Pir Bakhsh, and Mussammat Fatima, against Ahmad, Allahyar and Amir, sons of the same Pir Bakhsh by another wife; and the property in suit comprises wells and lands in seven villages. The lands and wells come into a variety of categories for the purposes of the suit, but there is no dispute regarding the identification of any part of it, and it will, therefore, be found sufficient to mention those categories in their proper place.

6th April 1908.

* * * * *

Plaintiff's case, put briefly, is like this —

(i) My mother, Mussammat Fatima, was daughter of our sonless kinsman Fateh Muhammad, who died about the year 1834. She was his heiress, and I, in turn, was her heir when she died in 1854 (*circiter*).

(ii) Fateh Muhammad and Pir Bakhsh were great-grandsons of one Khizar, caste Sial Maghiana, and the whole ancestral estate in *mauwas*

Maghiana, Khara, Jandran, Lak Badhar, Bagh and Basti Shah Shakur, was owned by them jointly in equal shares. Thus on death of Mussammatt Fatima I was entitled to half of all those ancestral lands.

* * * * *

(iv) Pir Bakhsh died in 1902, and on his death the parties were his heirs, but the rule of inheritance in the family being *chundavand*, I am entitled to one-half, and defendants jointly to the other half, of Pir Bakhsh's ancestral lands.

(v) Thus, I am entitled to three-fourth of the land mentioned in para. (ii) above, to three-fourth of the land in para. (iii), and to one-half of that in para. (iv), whereas as a matter of fact I have got much less.

* * * * *

(ix) The Settlement Officer by order of 3rd December 1903 has refused to concede inheritance by *chundavand* rule and has given me only one-fourth in Pir Bakhsh's estate. I should have one-half.

(x) I, therefore, claim (a) three-fourth instead of one-eighth of the ancestral lands in the 4 villages named in para. (viii); (b) three-fourth of all the purchased lands instead of five-eighth in part, and one-eighth in the rest; (c) one-half of the lands wrongly given in Maghiana to defendants in 1898.

Defendants denied that *chundavand* was the rule of inheritance; denied that plaintiff was entitled to any property as heir of Fateh Muhammad through his mother.

* * * * *

They asserted the validity of the gift of 1898.

* * * * *

The findings of the Court below were these:—

(i) The rule of inheritance in the family is *pagvand*.

* * * * *

(iv) The gift of 1898 is void.

* * * * *

Upon these findings a decree was passed which seems to be entirely in accordance with them, with the doubtful exception of the paragraph of the decree dealing with list 5 (E).

Each party appeals to this Court against those parts of the decree that tell against him;

* * * * *

The points for decision in this appeal really are :—

(a) *Chundavand v. Pagvand*.

* * * * *

(e) The validity against plaintiff of the gift or transfer of 1898.

(a) *Chundavand v. Pagvand*.

Mr. Shafi admits that the initial presumption is in favour of the *pagvand* rule, and here this initial presumption is strengthened by the statement of custom in the *Riwaj-i-am* (see page 152, part IV of the paper-book). The custom is there very clearly stated for the Sials as for all other principal tribes. The lands now in suit are in *pargana* Jhang, and Mr. Shafi wishes us to take it that the exception mentioned in para. 3 of the extract at page 152 aforesaid means that the whole *pargana* is an exception to the rule of *pagvand*, the three instances given being according to him exemplifications of the general rule in that *pargana*. We find ourselves unable to accept this interpretation, which is far-fetched and improbable, and which is hardly in accordance with the remarks of the Settlement Officer, Mr. Steedman, at page 183, para. 245 of the Settlement Report of 1880. Though the Settlement Officer warns his readers against relying too implicitly on the *Riwaj-i-am*, he states that custom was found to be so uniform that separate records of custom for *tahsils* were not necessary.

Mr. Shafi next wishes us to understand that the Court below was misled as to the weight of the *onus* on his client by its apparent idea that there was only one published ruling in favour of the division of property *per stirpes* in these cases. He has, of course, no difficulty in shewing that this is not so, and he has quoted 13 such rulings, beginning with *Ata Muhammad v. Faujdar Khan* ⁽¹⁾, and ending with *Ahmad Shah v. Mussammatt Talia Bibi* ⁽²⁾. He then goes on to argue that the *chundavand* custom is a family custom mostly, that

⁽¹⁾ 77 P. R., 1885.

⁽²⁾ 34 P. R., 1900.

the important thing to ascertain is custom of family at ancestral village, cf. *Ishrat Ali Khan v. Ahmad Ali Khan* (1), and that the Court below, taking into account the comparative rarity of polygamy in practice among ordinary agriculturists, should have considered the three instances 'in the family' discussed in the judgment under appeal sufficient to shift the *onus* from plaintiff to defendants. These three cases are described as Bhutta's case, Hambo's case, and Lakha's case. The last is admittedly an instance of the *chundavand* method of inheritance, and as such it finds a place in the aforesaid *Riwaj-i-am*, column 3; but, though the Court below treats it as an instance in the family of the parties, Mr. Shafi is unable to shew us in what way Lakha was related to that family, while Mr. Grey declines to admit the relationship. Thus all that can be said for the instance is that it is of the Sial Maghiana tribe and that the parties to it were residents of Maghiana. Bhutta's case is open to some criticism. It is only indirectly a case of *chundavand*, if at all; and it is strange that if it were looked upon in the tribe as a good instance, it should not have been mentioned in the *Riwaj-i-am*. Hambo's case is not directly either a case of *chundavand* or of *pagvand*, and it also is not mentioned in the *Riwaj-i-am*. The eldest son got $\frac{1}{6}$ th more than his normal $\frac{1}{3}$ rd share, defendant-respondents say, because he was *lambardar*, and clearly there was a family arrangement, for his step-mother, who had two sons, took $\frac{1}{3}$ th, the eldest son $\frac{1}{3}\frac{1}{6}$ th and the other sons $\frac{1}{3}\frac{1}{6}$ th each. When the mother died her sons fought over her $\frac{1}{3}$ th, and ultimately one took by compromise $\frac{1}{3}\frac{1}{6}$ th out of it, and the other $\frac{1}{3}\frac{1}{6}$ th. Notwithstanding the analogous case, *Pir Bakhsh v. Karim Bakhsh* (2), we are not inclined to take these cases as proving the *chundavand* rule; for the general custom of the Sial seems clear, and the defendants have given many instances from other sections of the tribe, and these instances fully establish the general custom as stated in the *Riwaj-i-am*. It must always be borne in mind in dealing with such cases as the present that old instances of the *chundavand* rule are not of much value, inasmuch as it is well known that in many tribes and places the rule, though once followed, is going out of use. We would also like to note in connection with this that Bhutta's case must be an old one, and that Juman, the son, who ultimately got $\frac{1}{2}$ instead of $\frac{1}{3}$ rd of Bhutta's property, went and founded the village of Bagh, and that there division has always

(1) 29 P. R., 1905.

(2) 22 P. R., 1895.

been by *pagvand*. It seems likely enough to us that Juman, who with his whole-brother in the first instance naturally took half there being 4 sons in all, was an important and powerful man and simply kept the half, without much regard to the rights and wrongs of the matter.

We find, then, that the *rulis paegvand*.

* * * * *

The last point (e) is peculiar. The Court below has set aside the gift, but we are not inclined to agree. No doubt the statement in the *Riwaj-i-am*, page 150, part IV of paper-book, of the custom amongst Sials may or may not be established on the record in the sense that a proprietor can simply by way of caprice make one son rich and leave another poor. But we are disposed to think that such a gift as this, effected to balance the mutation in favour of plaintiff years before of Fateh Muhammad's lands, should not be interfered with. That old mutation was, according to our finding, an act of grace on the part of Nasrat and Pir Bakhsh, by way of exercise of patriarchal power; and if Pir Bakhsh later on again exercised that power, in order to shew some favour to defendants, it would, in our opinion, be unjust to interfere in a pedantic spirit.

We accept the appeal of the defendants and reject that of the plaintiff, and we give plaintiff a modified decree.

* * * * *

Appeal allowed.

No. 51.

Before Mr. Justice Johnstone and Mr. Justice Lal Chand.

GURDIAL SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

ARUR SINGH AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 525 of 1906.

Custom—Inheritance—Right of widow to succeed to her husband's collaterals—Bhullar Jats of Amritsar and Gurdaspur Districts.

Found that by custom among Bhullar Jats of the Amritsar and Gurdaspur Districts a widow of a sonless proprietor was entitled to succeed collaterally to any property to which her husband, if alive, could have succeeded.

First appeal from the decree of Lala Harnam Das, District Judge, Gurdaspur, dated 28th February 1906.

Ishwar Das, for appellants.

Sukh Dial, for respondents.

The judgment of the Court, so far as is material of this report, was delivered by

26th July 1908.

JOHNSTONE, J.—The claim here is made by way of inheritance, and it covers lands, gardens and houses in *mauzas* Pathan Chak, Naushahra, Targarh and Gobindsar in the district of Gurdaspur, and in *mauza* Vachhoa in the Amritsar District. The full pedigree table of the family is to be found among the printed exhibits in the paper-book, and a table, abridged but adequate, is set forth at the beginning of the judgment of the Court below. The properties in suit are clearly defined, and the pleadings are sufficiently detailed in the said judgment and need not be repeated here. It is enough to say that the Court below drew up 12 issues and came to the following findings.—

* * * *

(c). Among these Bhullar Jats of Amritsar and Gurdaspur widows get a life estate in their husband's property, but do not inherit collaterally from his relatives. Hence the widows Karm Kour, Ind Kour and Balwant Kour, defendants, are not entitled to the $\frac{5}{12}$ th share claimed for them, and plaintiffs are entitled to $\frac{2}{3}$ th of the whole by inheritance.

* * * *

On these findings the Court decreed in full for the plaintiffs.

* * * *

Defendants 1 and 2 appeal, and plaintiffs have filed cross-objection.

* * * *

In regard to the right of widows in this *gôt* to succeed collaterally as their husbands would have succeeded, my opinion is not the same as that of the learned District Judge. There can be no doubt that no general custom exists in the Province whereby widows succeed collaterally as their husbands would have done; but there are many instances supported by judicial authority of such succession.

See *Rani v. Mokhi* ⁽¹⁾, Arains of Nakodar; *Eda Khan v. Mussammat Amiro* ⁽²⁾, Rajputs of Hoshiarpur; *Puran v. Mussammat Raj Devi* ⁽³⁾, Rajputs of Una; *Mussammat Shibbo v. Buta* ⁽⁴⁾, Rajputs of Hoshiarpur; *Bahadur Singh v. Mussammat Nihali* ⁽⁵⁾, Jats of Ajnala; *Anar Devi v. Kaulan* ⁽⁶⁾, Rajputs of Hoshiarpur; *Khem Singh v. Biru* ⁽⁷⁾, Rajputs of Jullundur; *Saddan v. Khemi* ⁽⁸⁾, Jats of Jagraon; and *Lahori v. Radho* ⁽⁹⁾, Ghirths of Kangra.

I do not think I need not go minutely through these rulings, especially as *Bahadur Singh v. Mussammat Nihali* ⁽⁵⁾ is an Amritsar case, and was based upon a specific enquiry into custom in all parts of Amritsar. In view of these rulings, and especially of *Bahadur Singh v. Mussammat Nihali* ⁽⁵⁾ I am of opinion that such an authority as of *Mussammat Aso v. Mussammat Tabi* ⁽¹⁰⁾ (from Ferozepore) loses much of its value. Any how as regards the part of the Province about Amritsar and Hoshiarpur it cannot fairly be said that the collateral succession of widows is very "exceptional." In most of the above rulings it is plainly said that the widow succeeds exactly as her husband would have done, that is, to any agnatic relative of the latter.

Mr. Sukh Dial, in connection with the *Bahadur Singh's* case, remarks, on the strength of a passage in the judgment of the Lower Courts, that these Bhullar Jats live mainly in Gurdaspur, and not a single ruling of Gurdaspur has been cited. But the residence of the Bhullars as a whole in Gurdaspur is denied, and I can find no indications of it, but only two indications the other way, viz., first, *mauza* Bhullar is certainly in Amritsar (see fifth of the mutations relied upon by Lala Ishwar Das); and secondly, while no Bhullars are mentioned in the Gurdaspur Gazetteer of 1891-92, they are mentioned in the Amritsar Gazetteer (page 52, 1892-93) as a tribe deserving mention. Thus the extreme value of the ruling of *Bahadur Singh v. Mussammat Nihali* ⁽⁵⁾ is clear.

Mr. Sukh Dial, with some force and reason, points out that in most of the rulings and authorities in favour of collateral succession of widows, they were allowed to succeed only to husband's brothers or other very near relatives;

(1) 146 P. R., 1889.

(2) 177 P. R., 1889.

(3) 56 P. R., 1891.

(4) 111 P. R., 1891.

(5) 133 P. R., 1893.

(6) 43 P. R., 1905.

(7) 44 P. R., 1905.

(8) 15 P. R., 1906.

(9) 72 P. R., 1906.

(10) 77 P. R., 1893.

whereas here all the three ladies' husbands were related to Sundar Singh in the fifth degree; and he points out that the distinction between succession within a very small group and collateral succession generally is very strong and was explained in *Rani v. Makhi* ⁽¹⁾. I can readily concede that in case of very distant relationship widows might very often not be able to enforce their rights; but in principle I can see no distinction. If the widow takes her husband's place, as most of the rulings say she does, there is no limit to her succession collaterally except the limit that would have applied also to her husband. In at least one ruling, *Puran v. Mussammat Raj Devi* ⁽²⁾, the widow's husband was in fourth degree from the deceased person, and in many other cases the relationship was more remote than that of a brother.

The special evidence of instances in the present case shews that collateral succession of widows has been recognised in this very family, and there are instances in other villages. Thus, in this very family this same widow, Mussammat Karm Kour (defendant), widow of Pal Singh, succeeded to the estates of three brothers of her husband's father to the exclusion of her husband's grandfather's brother. Altogether three instances are given by the witnesses, Dhanpat Rai, *patwari*, and others, and there are five mutation entries (one of which covers one of the three instances aforesaid).

Further, as an indication of the feeling of the family on the subject in the litigation of 1882 (see page 16 of paper-book), plaintiffs expressly left out Mussammat Karm Kour's share in suing, shewing they recognised her right to succeed collaterally.

The oral evidence as to custom has, apart from the three instances noticed above, been rightly found of little value; and in my opinion Lala Ishwar Das is right in insisting upon the inadequacy of the four judgments relied upon by the other side. These are at pages 20, 23, 32 and 39 of the paper-book. The first and third of these are not in point at all, and in the fourth the widow was evidently too poor to make any fight of it. In the second the *onus* was laid on the widow, and she failed to discharge it. Here in the present case on the contrary there is a great deal of support to the widow's

⁽¹⁾ 146 P. R., 1869.

⁽²⁾ 56 P. R., 1891.

right; and in short I would find in favour of their title to succeed to appropriate shares of Sundar Singh's estate, *i.e.*, an aggregate of $\frac{5}{13}$.

* * * *

I would, then, accept the appeal only to this extent that the shares of the three widows aforesaid $\frac{5}{12}$ be deducted from the decree in which instead of $\frac{3}{4}$ of this and that plaintiffs will be given $\frac{5}{12}$.

* * * *

No. 52.

Before Mr. Justice Robertson and Mr. Justice Shah Din.

PEACHEY,—(JUDGMENT-DEBTOR),—APPELLANT,

Versus

PUNJAB BANKING COMPANY, LIMITED, LAHORE,—
(DECREE-HOLDER),—RESPONDENT,

Civil Appeal No. 564 of 1906.

}

APPELLATE SIDE.

Acknowledgment—Acknowledgment in case of decree—New period—Exclusion of time of proceeding bonâ fide—Limitation Act, 1877, Sections 14, 19.

'A' obtained a decree in 1900 against 'B' with a lien on a tea garden. In 1901 'C' in execution of a money-decree which he had obtained in 1898 against 'B' attached that garden. 'B' wrote two letters to 'A' in March 1901 and October 1903, telling him about the attachment and asking him to inform the executing Court of his lien and to apply for recovery of the amount of his decree out of the sale-proceeds. 'A' accordingly applied twice in 1901 and 1902, and recovered the amount due to him under his decree but on appeal by 'B' the execution sale was, in 1905, set aside on the ground of irregularity, and 'A' was made to refund the amount he had received out of the sale-proceeds. Immediately after 'A' applied for execution of his own decree, 'B' pleaded that the application for execution not having been filed within three years from the date was barred by limitation.

Held that the letters written by 'B' to 'A' in 1901 and 1903 amounted to an acknowledgment of A's right to execute and obtain satisfaction of the decree within the meaning of Section 19 of the Indian Limitation Act, and saved A's application for execution from the bar of limitation.

Held, also, that 'A' was entitled under section 14 of the Act to exclude period which elapsed between the date of his first application made in 1901 and the date on which he was ordered to refund the amount received by him out of the sale-proceeds of the tea garden.

Query.—Whether the applications of 1901 and 1902 were not "steps in-aid of execution" within the pur view of Article 1 (4) of the Act.

Miscellaneous first appeal from the order of F. B. R. Spencer, Esquire, District Judge, Kangra, dated 25th April 1906.

Sukh Dial, for appellant.

Shircore, for respondent.

The judgment of the Court was delivered by

4th Feby. 1907.

SHAH DIN, J.—This appeal arises out of execution proceedings. The facts which are material to the decision of the appeal lie within a short compass and are as follows:—

The decree which is sought to be executed was passed by this Court in favour of the Punjab Banking Company on the 1st of March 1900, and was one "for Rs. 7,401-8-0 bearing "future interest at Rs. 6 per cent. per annum from the date "of the decree of the District Judge (*viz.*, 23rd June 1896) to "date of realization against Mr. Peachey, defendant 1, personally, and against the Monsimbal Tea Estate realizable by "attachment and sale of that estate subject to the farm to "Arjan Singh, and against other property of defendant 1." The decree-holders did not make a formal application for execution of this decree until the 23rd November 1905, and it is conceded that the application in question would be barred by time unless limitation were saved by reason of certain applications made by the decree-holders in the course of execution proceedings initiated by certain other judgment-creditors (Ram Chand and others) of Mr. Peachey, and by two letters written by the latter in 1901 and 1903 to the Bank. It appears that on the 23rd December 1898, Ram Chand and others, decree-holders, applied for execution of a decree for Rs. 4,202. obtained by them in the Amritsar District in March 1893 against Mr. Peachey. These decree-holders got the Monsimbal Tea Estate attached, and in 1901 got an order for its sale to take place on the 20th April 1901. On 23rd March 1901, Mr. Peachey wrote a letter to the Punjab Banking Company (Exhibit 12) in which he informed the Bank that the Monsimbal Estate was to be sold on 20th April at the instance of Ram Chand, decree-holder, and asked the Bank to apply to the Court to have the auction sale set aside. In this letter occurs the following passage:—

"I have done my best and have informed the Court "that the garden is under mortgage to you, and have shown the "Chief Court judgment, but to no effect. Please write to "M. L. Kaysta, Barrister at-law, to file an application "at once."

In pursuance of the request contained in this letter the Bank made an application to the executing Court on 4th April 1901 (filing with it a copy of the judgment of the Chief Court, dated 1st March 1900), praying that the amount due to the Bank, which under the judgment of this Court was a charge on the Tea Estate, be paid first out of the sale-proceeds, and that the balance be made over to Ram Chand, decree-holder. No order appears to have been passed upon this application. A second application was put in by the Bank on the 21st January 1902, in which a reference is made to the previous application, and the prayer is repeated that the auction sale be made subject to the charge created by the decision of the Chief Court in favour of the applicants. Upon this application the District Judge (Mr. Langley) passed an order on 21st February 1902 in the following terms :—

“ The decree of the Punjab Banking Company is against the defendant (Peachey) personally and against the Mon-simbal Tea Estate of which the plaintiffs (the Bank) are now the sole mortgagees. * * It is clear that in virtue of their mortgage-deed of September 11th, 1891, the Punjab Banking Company have the first claim on proceeds of sale of the mortgaged Tea Estate, the application is accordingly granted.”

After certain intermediate proceedings, the Tea Estate was sold by auction on 22nd September 1903 for Rs. 14,050 ; and the Bank made a third application on the 2nd of October 1903, reiterating their prayer as to prior payment out of the sale-proceeds in the terms of their previous applications. Before orders were passed on this application, Mr. Peachey wrote to the Bank another letter on 5th October 1903, in which, after informing the Bank of the auction sale on 22nd September for Rs. 14,050, he requests them “ to wire at once to Mr. Kaystha letting him know the amount due by me to you and on the security of the garden, and that you object to the sale till your full amount is guaranteed by Ram Chand and Company”. The letter goes on to say :—“ The file only shows Rs. 11,000 due to you, and under the circumstances you will only get Rs. 11,000, and the balance will be paid to Ram Chand and Company.” As requested in this letter the Bank made a fourth application on 8th October 1903, stating the total amount due to them (including Rs. 7,401 which under the decree of the Chief Court was a specific charge on the estate) as Rs. 33,700, and praying that the auction sale,

being for a smaller sum, may not be confirmed. The final order on this application was passed on 14th November 1903, allowing the Bank a sum of Rs. 10,685-4-9, which consisted the two items of (1) Rs. 7,401-8-0, the amount decreed by the Chief Court, and (2) Rs. 3,283-12-9, being the interest thereon up to the date of the order, and disallowing the additional amount alleged to be due to the Bank out of the estate. The Bank applied on 21st December 1903 to draw this sum of Rs. 10,685-4-9, and it was paid to them on the 23rd December. The judgment-debtor, however, appealed to this Court from the order confirming the auction sale, and the sale was set aside by this Court on 7th January 1905 (see *Peachey v. Jamna Das* ⁽¹⁾). On the case going back to the executing Court, Mr. Peachey paid in the amount of the decree due to Ram Chandat whose instance execution proceedings had been going on, whereupon the Court stopped further action on the execution side, called upon the Punjab Banking Company to refund Rs. 10,685-4-9 which had been paid to them out of the sale-proceeds, and gave back possession of the Tea Estate to the judgment-debtor. The Bank paid in Rs. 10,685-4-9 as directed on 11th August 1905, and applied for execution of their own decree on 23rd November 1905.

The question for decision in this appeal is whether this last mentioned application is within limitation. The judgment-debtor in the Court below contended that it was not within time, but the Court has decided that it is, on the following grounds :— (1) that the applications made by the decree-holders on 4th April 1901 and 21st January 1902 were applications to the executing Court “ to take a step in aid of execution ” within the meaning of Article 179, clause (4) of Schedule II to the Limitation Act ; (2) that the letters addressed by the judgment-debtor to the Bank on 23rd March 1901 and 5th October 1903 contain valid acknowledgments of liability within the meaning of Section 19 of the Act ; (3) that the decree-holders have been making *bond fide* efforts to get satisfaction of their decree between 1901 and 1905, and that they are, therefore, entitled to the exclusion of the period between these years.

Under Section 14 of the Act Mr. Sukh Dial, who argued the appeal with considerable ability, on behalf of the judgment-debtor, strenuously contended before us that the grounds upon which the decision of the Lower Court proceeds were not tenable, and that the application of 23rd November 1905 was, therefore,

(¹) 47 P. R., 1905.

barred by limitation. In the view we take of the case, it is unnecessary for us to consider and decide whether the applications of 4th April 1901 and 21st January 1902 were or were not "steps-in-aid of execution" within the purview of Article 179 (4), Schedule II to the Limitation Act, as we think that, under the circumstances disclosed in this case, the second and the third grounds upon which the Lower Court's decision is based are sound.

The first letter of the judgment-debtor, dated 23rd March 1901, expressly mentions "the Chief Court judgment," which the writer admitted in his evidence as a witness for the Bank was no other than the judgment, dated 1st March 1900, and refers to the estate as being under "mortgage" to the Bank, meaning of course the "charge" created thereon by the decree of this Court. The letter, therefore, contains an admission of liability to the Bank arising out of this Court's decree, and as the writer asks the Bank to apply to the executing Court to safeguard their interests as decree-holders (for that is the only reasonable interpretation of the letter) the writer acknowledges that the Banking Company have the right to get satisfaction of their decree out of the Tea Estate. The expression "set aside the sale" used in the letter is clearly inaccurate and does not convey the real intention of the writer, as admittedly no sale had taken place at the time: and its true meaning is further explained by the action which the Bank took upon this letter, namely, their application of 4th April 1901 which contains a distinct prayer, *not* that the sale be set aside but that the amount due to the Bank under the Chief Court judgment be paid out of the sale-proceeds when the sale takes place.

Similarly the second letter, dated 5th October 1903, contains an express admission that "Rupees 11,000 were due" to the Bank as "shown by the file", and that "under the incumbrance" (*i.e.*, the charge created by the decree of the Chief Court) "you will only get Rs. 11,000." If this is not an acknowledgment of liability in respect of the Bank's right as decree-holders to receive Rs. 11,000 (which was only an approximate figure, the real amount being Rs. 10,685-4-9) out of the sale-proceeds, it is somewhat difficult to see what is a valid acknowledgment for purposes of Section 19 of the Limitation Act. Under explanation to the section an acknowledgment is sufficient though it omits to specify the exact nature of the right; but here we have a case where the nature of the right is, when considered in the light of the proceedings pending in 1901-1903 and the other attendant circumstances, sufficiently

specified, so far as it could be done for purposes of the object then in view, by the judgment-debtor himself, and yet it is argued that the latter was not admitting his liability to the Bank in respect of their right to get satisfaction of their decree "with the knowledge that he was admitting it." The existence of the decree of the Chief Court in favour of the Bank is clearly admitted in Mr. Peachey's letters, as also that of the charge on the Tea Estate which was created by that decree; and the decree-holders are asked to apply to get their charge recognised and to be paid out of the sale-proceeds before Ram Chand and Company. Under these circumstances the observations of their Lordships of the Privy Council in *Sukhamoni Chowdhurani v. Ishan Chunder Roy* (1), (at page 100) and in *Maniram Seth v. Seth Rupchand* (2), (at pages 1057-1058) would fully apply to this case.

In support of his contention Mr. Sukh Dial cited *Dharmu Vithal v. Govind Sadvalkar* (3), (pages 102-103) and *Venkata v. Parthasaradhi* (4). Now, in the Bombay case the facts were wholly dissimilar to those of this case, and the principle enunciated therein is in no way departed from in the view we take of the effect of Mr. Peachey's letters. There the receipt which was relied upon as containing an acknowledgment of liability in respect of the plaintiff's right to redeem the land, simply acknowledged having received possession of the mortgaged land as directed by the decree, and it was rightly held that all that this receipt admitted by implication was that the land had been awarded to the decree-holder who passed the receipt. The decree could not be incorporated into the receipt by reference, nor could it be held that since the decree mentioned the mortgage of 1827, therefore the decree-holder in passing the receipt in question had the mortgage present to his consciousness and must be taken to have admitted the existence of a jural relation between himself and the mortgagor. Again, the Madras case clearly is not in point. There all that was held was that a particular deposition given by the obligor of a bond as a witness in a suit to which he was not a party did not contain an acknowledgment of the debt sued upon, because there was in the whole of the statement no unqualified and unequivocal admission that the debt in question was at all due. The principle laid down is (see page 222, paragraph 2) that "the acknowledgment" must be such as will lead the Court to infer an intention on the

(1) L. R., 25 I. A. 95.

(3) I. L. R., VIII Bom., 99.

(2) I. L. R., XXIII Cal., 1047. (4) I. L. R., XVI Mad., 220.

“part of the writer to pay or satisfy the debt.” It is this principle which is to be applied to the facts of each particular case, and applying it to the circumstances of the present case, we are clearly of opinion that each of the letters of Mr. Peachey, dated 23rd March 1901 and 5th October 1903, aforesaid contains an acknowledgment of liability within the meaning of Section 19 of the Limitation Act, and that the present application for execution is therefore amply within time.

With regard to the third ground on which the Lower Court has based its decision, we think, after having given our very best consideration to the argument of Mr. Sukh Dial in support of the contrary position, that Section 14 of the Limitation Act applies to this case. From the facts as summarised above it is perfectly clear that the respondents in good faith made no less than four applications, namely, on the 4th April 1901, 21st January 1902, 2nd October 1903, and 8th October 1903, with a view to obtain satisfaction of their decree, which is precisely the relief sought in the present application, and that the Court to which these applications were made was ultimately “unable to grant” them because of the auction sale having been set aside by order of this Court, dated 7th January 1905, and because of the judgment-debtor having paid in the decretal amount due to Ram Chand and others, which necessarily resulted in the executing Court ceasing to exercise jurisdiction in regard to the proceedings initiated by Ram Chand’s application for execution. It can hardly be seriously argued that because at one time the applications of the Bank were accepted and Rs. 10,685 were paid to them out of the sale-proceeds, therefore, although the sale was finally set aside by this Court and the amount received by the Bank refunded by order of Court and the execution proceedings were withdrawn from the cognizance of the Court, the latter cannot be said to be “unable to grant” applications. Such a contention is, we consider, untenable, and we have no hesitation in overruling it. We hold therefore that in computing the period of limitation for the present applications the decree-holders are entitled under Section 14 of the Limitation Act to exclude the period between the 4th April 1901, the date of their first application, and the 11th August 1905, the date on which they refunded the amount which they had received out of the sale-proceeds of the Monsimbal Tea Estate.

For the above reasons, we hold that the decree-holders’ application for execution, dated 23rd November 1905, is within time, and we dismiss this appeal with costs.

Appeal dismissed.

No. 53.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

APPELLATE SIDE.

YAD ALI AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

MUBARAK ALI,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 507 of 1905.

Religious Institution—Suit for removal of a Mutwalli and Imam by reason of a change in his religious views—Limitation for such suit—Starting point of Limitation—Limitation Act, 1877, Schedule II, Article 120.

Held that the limitation applicable to a suit for a declaration that the Mutwalli and Imam of a certain mosque by reason of a change in his religious views at variance with the beliefs of the founders of the institution is liable to be dismissed from his office is that contained in Article 120 of the Second Schedule to the Indian Limitation Act, and the period begins to run from the date when such change takes place.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated 3rd January 1905.

Beechey, for appellants.

Kamal-ud-din, for respondent.

The judgment of the Court was delivered by

26th April 1907.

SHAH DIN, J.—In this case the material allegations in the plaint on which the plaintiffs' claim was based are as follows :—

“(1). The Jama Masjid in question (situate in the “Sadar Bazar, Sialkot Cantonment) was built with funds “raised by subscription among Muhammadans of the Hanafi “sect.

“(2). From time to time Government made free grants “of land for the said *masjid*, and houses were constructed on “the land so granted for the residence of the Imam of the “*masjid* with subscriptions raised among Hanafis.

“(3). Ghulam Ali and other *raises* of the Hanafi sect, “resident in the Sadar Bazar, Sialkot, appointed the “defendant's father Imam of the said *masjid* and *nikah-kharwan*, and made over to him the management of the “*masjid* and of the property attached thereto.

“(4). On the death of the defendant's father, the “defendant succeeded to the office of Imam and managed “the affairs of the *masjid* and had control of the property “appertaining to it.

"(5). Four years ago, the defendant became the follower of the Mirza of Qadian and deserted the *masjid* in question. He went off to Qadian and took up employment under the Mirza. The Hanafi sect (in the Sialkot Cantonment) therefore appointed Qazi Rafi-ullah Imam of the *masjid*.

"(6). The defendant returned recently (from Qadian) and took possession of the houses and the land appertaining to the *masjid*. He leads prayers in the *masjid* as Imam of a few persons of his (Mirzai) sect.

"(7). The Ulama and Imams of the Hanafi persuasion have promulgated the *fatwa* of *kufar* against the followers of the Mirza (of Qadian), and have declared it to be unlawful for the Hanafis to be led in prayers by one of the Mirzai creed.

"(8). According to provincial and local custom and under the provisions of the Muhammadan Law, the defendant (by reason of his being a follower of the Mirza of Qadian) is not competent to officiate as Imam of the said *masjid*, nor has he any right to say prayers therein.

"(9). The houses and the land appertaining to the said *masjid*, which are in possession of the defendant are stated by him to be his own property. He was never, however, formally appointed Mutwalli of the mosque and of the property aforesaid. Hence, he is liable to be dismissed from the office of Mutwalli."

Upon these allegations the following reliefs were claimed :—

- "(a) That the defendant be declared unfit for the office of Imam of the *masjid* in question ;
- "(b) That he be ejected from the property appertaining to the *masjid* of which he is in possession ;
- "(c) That he be dismissed from the office of Mutwalli ;
- "(d) That any other relief which the Court may think fit to grant be given.

The plaint as originally filed was much more concise than the amended plaint, but the circumstances stated therein as constituting the cause of action were substantially identical with those set forth in the latter document, as will appear from the third, fourth, and fifth paragraphs of the unamended plaint, which run as follows :

"(3) Maulvi Fazl Ahmad (defendant's father) during his lifetime, and after him the defendant, remained

“ followers of the Hanafi religion, and all the Muhammadans
“ of the Sialkot Cantonment used to be led by them in prayers.

“ (4) Four years ago, the defendant changed his religious
“ views, became the follower of Mirza Ghulam Ahmad of
“ Qadian, and took up employment under him and began
“ to reside at Qadian. Hence, he is disqualified from dis-
“ charging the duties of Imam and Mutwalli in accordance
“ with the Hanafi religion.

“ (5) Owing to the defendant having adopted new
“ religious views, disputes have taken place several times
“ between him and the Muhammadans of the Hanafi sect.”

Then followed the sixth and last paragraph, which contained the prayer for a merely declaratory decree in respect of the defendant being liable to be removed from the offices of Imam and Mutwalli ; and of the plaintiffs having thought to appoint in his place any other person whose religious views were in accord with those of the plaintiffs.

In the original plaint the suit was valued for purposes both of Court-fee and jurisdiction at Rs. 130, while in the amended plaint, in which consequential relief was prayed for in addition to a declaration, it was valued at Rs. 430 for both purposes. The prayer for consequential relief in the amended plaint, however, it will be observed, did not take the form of a prayer for delivery to the plaintiffs of possession of the mosque and of the immoveable property appertaining thereto, because had it taken that form, the plaintiffs would have had to pay an *ad valorem* Court-fee stamp upon the value of the said property, which in this case was found by the first Court, after a remand by the Lower Appellate Court, to be Rs. 5,648-10-0. In fact the defendant took the objection that the Court-fee stamp affixed by the plaintiffs was insufficient, but the First Court decided, and decided we think rightly, upon the authority of the ruling in No. 56 Punjab Record 1896, that since the plaintiffs simply sought the removal of the defendant from the office of Mutwalli, which would involve his ejection from the immoveable property of which he was in possession in that capacity, and did not seek possession of the property for themselves, full stamp could not be levied upon the value of the said property.

We have referred to the nature and valuation of the plaintiffs' suit in detail in order to make it clear that the

suit as laid does not (and indeed it was not seriously contended that it does) fall within the purview of Articles 142 or 144 of the Second Schedule of the Limitation Act.

In answer to the allegations in the original plaint, the defendant put forward a number of pleas, which it is unnecessary to notice at length for purposes of this appeal, urging, *inter alia*, that the defendant had become a follower of the Mirza of Qadian in the beginning of 1891, that this fact had been within the plaintiffs' knowledge ever since that year, that the defendant had not deserted the mosque nor had he neglected his duties as Imam and Mutwalli, and that the plaintiffs' suit was barred by limitation. The plaintiffs in their replication traversed all the pleas.

Upon the above findings, the first Court framed eight issues, the fourth and fifth issues relating in part to the question whether the defendant had become a follower of the Mirza of Qadian four years before suit, as alleged by the plaintiffs, or in the year 1891, as pleaded by the defendant, and the eighth issue relating to the question of bar by limitation. After a full discussion of the evidence on the record the Court found that the defendant had become a follower of the Mirza in 1891, and that the plaintiffs' allegation that some time in 1894 he reverted to his original form of belief, and became a professed follower of the Mirza for the last time some four years before suit, was not established. It, therefore, held that Article 120 of the Second Schedule of the Limitation Act applied to the suit as laid, that the right to sue accrued to the plaintiffs in 1891, and that the suit which was brought in July 1903 was consequently barred by limitation. On the merits also it arrived at findings adverse to the plaintiffs' claim, and dismissed the suit.

On appeal, the Divisional Judge, holding that the plaintiffs could not sue for a mere declaration of title, inasmuch as they were able to seek further relief within the purview of Section 42, Specific Relief Act, remanded the case under Section 566, Civil Procedure Code, to enable the plaintiffs to amend their plaint and for a trial of any additional issues which may arise out of the pleadings of the parties. The plaintiffs filed an amended plaint (as set out above), the defendant raised a few additional pleas, and the Court of first instance framed three more issues, finding on all three in defendant's favour. On a return being made to the Lower Appellate Court, the latter did not enter into a

consideration of the question of limitation, but, found, in agreement with the First Court, that the defendant had become a follower of the Mirza of Qadian in 1891, and that the alleged reversion on his part in 1894 to his original form of belief and a second declaration of his faith in the Mirza four years prior to suit were not established. It entered upon a discussion of the merits of the case and finding on all the essential points in defendant's favour dismissed the appeal.

A petition for revision was filed in this Court and was admitted as a further appeal under Section 70 (1) (b) of the Punjab Courts Act: although Mr. Beechey has in the grounds of appeal raised several points relating to the merits of the case, the arguments before us have on both sides been limited to the question of limitation, as it appeared to us that it was needless to enter into the merits, if the view of the First Court in regard to limitation was a sound one. After giving our best consideration to the arguments advanced by Mr. Beechey on behalf of the appellants, we think that the suit is barred by time.

It appears to us to be clear from the allegations in the amended plaint, no less than from those in the original plaint, that the plaintiffs' cause of action is that the defendant changed his religious views and became a follower of Mirza Ghulam Ahmad of Qadian four years before suit, and that by reason of the said change of religious belief, which involved a repudiation of the Hanafi system of faith, he became (conformably to the *fatwa* pronounced by the Hanafi Imams and doctors, as stated in the amended plaint) a *Kafar* and as such disqualified for performing the duties of Imam and Mutwalli of the mosque in question. That being so it is manifest that the right to sue accrued to the plaintiffs at the time when the defendant, according to the plaintiffs' allegations, abjured the Hanafi creed and became a follower of the Mirza of Qadian; and it is further clear that the suit not being one for possession of immoveable property or any interest therein, as has been shown above, and not being specially provided for in the Second Schedule of the Limitation Act, falls within the purview of Article 120 of the said Schedule. The question of limitation in this case, therefore, is narrowed down to the simple question of fact; when did the defendant change his religious views and become an adherent of the Mirza of Qadian? The plaintiffs alleged in

their plaint that this took place four years before the institution of the suit, whereas both the Courts below have found that it was so far back as 1891 that the defendant became a follower of the Mirza, and that the plaintiffs' allegation that there was a reversion on the part of the defendant to the orthodox form of belief in 1894 and a subsequent formal repudiation of it in or about the year 1899 was not substantiated. This appeal having been admitted under clause (b) of Section 70 of the Punjab Courts Act, we must accept as final the finding of fact arrived at by the Lower Appellate Court on this point, and we must, therefore, hold that the right to sue accrued to the plaintiffs in 1891, and that their suit not having been brought within six years after the accrual of the right is, under Article 120 of the Limitation Act, barred by time.

We can find no direct authority applicable to the question of limitation in a suit such as the present, but the view, which we venture to hold receives considerable support from the decisions in *I. L. R.*, XIX *Calc.*, 776, and *I. L. R.*, XXVI *Mad.*, 113. In the Calcutta case, it was held that a suit to oust a Shebait of a Hindu endowment (to which immoveable property was attached) from his office, the appointment to which had been made by nomination, was a suit for which no period of limitation was specially provided, and was, therefore, governed by Article 120 of Schedule II of the Limitation Act. In the Madras case, the Calcutta ruling was cited with approval and followed; and with reference to the defendant's contention that the suit being one for possession of immoveable property attached to a temple (of which the plaintiff claimed to be sole Dharmkarta) was governed by Article 144 of the Limitation Act, the learned Judges observed: "The right to the land is only secondary to and dependant upon the right to the office; and if the right to recover the office is barred, the right to recover the land attached to it is equally barred."

Mr. Beechey on behalf of the appellants tried to get over the difficulty of limitation by arguing (1) that the offices of Imam and Mutwalli not being hereditary, the defendant was merely a servant of the congregation or body of worshippers, and as such was liable to be dismissed by the latter at any moment without any cause being alleged or shown for such dismissal, and (2) that the plaintiffs as representing the congregation had (as he put it) a "continuing right" to the Imam of the mosque holding religious views in consonance

with theirs, and that, therefore, a fresh period of limitation began to run at every moment of the time during which the enjoyment of that right was withheld from the plaintiffs.

The second contention, though plausible at first sight, has, we consider, no force at all, as Section 23 of the Limitation Act can have no application to a case like the present. Here the alleged change of religious views on the part of the defendant, which constitutes the plaintiffs' cause of action took place once for all in 1891, and in no sense of the term was this change a "wrong" constituting an invasion of a civil right vested in the plaintiffs as worshippers at the mosque of which the defendant is the Imam. Even if the alleged change was a "wrong" *qua* the plaintiffs, it exhausted itself as soon as it took place, and the subsequent persistent adherence by the defendant to his newly adopted views cannot properly be described as a "continuing change" amounting to a "continuing wrong" such as is contemplated by the terms of Section 23 of the Act.

As regards the first contention we think it right to observe that it embodies a view of the case which was never set up in the Courts below, and we would not have noticed it in our judgment, were it not for the fact that in our opinion the argument advanced in no way prejudices the defendant's case.

In support of this contention Mr. Beechey relied upon certain passages in Sayed Amir Ali's *Muhammadian Law*, Volume I (second Edition), page 365 and page 371. The passage at page 365 (paragraph 3) has no application to this case at all, as it relates to the question of the appointment of the Mutwalli by the congregation in a case where the office is vacant by reason of the former Mutwalli's death (see page 364, last paragraph), and *not* to the *power* of the congregation to remove a Mutwalli from his office. Similarly, the passage at page 371 (third paragraph) is inconclusive, inasmuch as all that is said therein is that if the "person" appointed by the *wakif* (to the office of *Imam* "or *Muazzin*, etc.) is incompetent or unfit, the congregation "have a right to select a more fit person." In the last edition (1904) of this work the author adds to the above paragraph the following very important rider:—

"Will the appointment, however, take effect without the "sanction of the Kazi? I take it that an application "should have to be made to the Kazi for the removal of

“the incompetent servitor and the appointment of the person selected by the congregation.”

It would thus appear that the above cited passages relied upon by the appellant's counsel in support of his position do not help him at all, and we are clearly of opinion that the plaintiffs have failed to show that, under circumstances disclosed in this case, they have the right to remove the defendant from the offices of Mutwalli and Imam at their own will and pleasure without assigning and establishing sufficient cause for such removal.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

No. 54.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

KHAIRAN,—(PLAINTIFF),—APPELLANT,

Versus

NAURANG KHAN,—(DEFENDANT),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 416 of 1907.

Custom—Inheritance—Gift of landed property by way of dowry to a female—Mutation in favour of her husband—Death of donee without issue—Right of husband in presence of donor.

Held that a gift of landed property expressly made by way of dowry to a female on the occasion of her marriage enures solely for the benefit of the donee and her issue, and in case of her dying childless reverts to the donor.

The mere circumstances of her husband's name having been entered as donee in mutation proceedings does not after her death entitle him to retain possession of the property.

Further appeal from the decree of Major G. O. Beadon, Divisional Judge, Hoshiarpur Division, dated 10th January 1907.

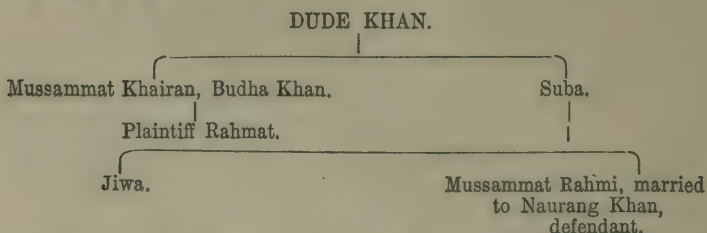
Kamal-ud-din, for appellant.

Dwarkan Das, for respondent.

The judgment of the Court was delivered by —

12th July 1907.

SHAH DIN, J.—The subjoined pedigree will help to explain the fact of the case.



Budha married Mussammat Khairan and had by her a son, Rahmat, who predeceased him. Suba had a son Jiwa and a daughter Mussammat Rahmi who was married to Naurang Khan.

Both Budha and Jiwa appear to have died one after the other, and Mussammat Khairan succeeded to the estates of both on the usual widow's estate.

On 28th May 1903 Mussammat Khairan caused mutation of names to be effected in favour of Naurang Khan (to whom Mussammat Rahmi had been married shortly before) in respect of a gift of 169 *kanals* of land, the area now in dispute which was part of the land which she had got from Jiwa. At the mutation the gift was objected to by the collaterals of Budha, but the objection was overruled and the mutation effected in Naurang's name. The reason for the mutation will appear presently.

Budha's collaterals subsequently contested the gift in a Civil Court, and obtained a decree declaring that it shall not affect their rights of reversion on the death of Mussammat Khairan.

In the beginning of 1906 Mussammat Rahmi died without issue; and about two months after her death Mussammat Khairan brought the present suit against Naurang Khan for possession of 169 *kanals* on the allegations that she had made the gift in respect of the land in dispute to Mussammat Rahmi, daughter of Jiwa, and not to Naurang Khan, defendant; that it had been agreed that she (Mussammat Khairan) should enjoy the produce during her lifetime; that Naurang Khan had fraudulently got mutation effected in his own name, and that Mussammat Rahmi having died without issue, she (Mussammat Khairan) was entitled to recover possession of the land from Naurang Khan.

Naurang Khan pleaded that the land in suit had been gifted to him and not to Mussammat Rahmi; that it had not been agreed that the produce of the land would be enjoyed by the plaintiff for her life; and that the gift being absolute, the plaintiff was not entitled to revoke it and to recover possession of the land.

On these pleadings the first Court framed three issues and found (1) that the gift was made to Naurang Khan defendant and not to Mussammat Rahmi; (2) that at the time of the gift it was not agreed that Mussammat Khairan should receive the produce for her life; and (3) that though Mussammat Khairan made the gift in favour of Naurang and not Mussammat Rahmi, she did so under some deception or fraud or under the undue influence of defendant, or his father, and that therefore she was entitled to get back the land. The plaintiff's suit was therefore decreed.

On appeal the learned Divisional Judge concurred in the first two findings as above set out, but disagreeing with the third finding on the ground that it was not based upon any evidence on the record, dismissed the plaintiff's suit.

After hearing the learned pleaders on both sides and referring to the mutation proceedings of May 1903, we think that this appeal must succeed upon the short ground that the gift in question was intended to be made by Mussammat Khairan, and must be held to have been made by her, to Mussammat Rahmi and not to Naurang Khan, and that the mutation of names was made in favour of the latter simply and solely to enable him to hold the land and to manage it for and on behalf of his wife, Mussammat Rahmi. The relevant portion of the mutation order of 28th May 1903 runs as follows:—

“Mussammat Khairan Wahiba bamaujudagi Kunde Khan, Lambardar, tasdiq karti hai ki Jiwa mere dewar ne bawagt wafat mujko wisiat ke thi ki jis waqt meri hamshira Mussammat Rahmi ki Shadi kari jwe usko jahez men yeh arazi di jave is liye bamujab kahne Jiwa ke is arazi ka hiba Mussammat Rahmi ke khawand Naurang Khan ke nam karti hun * * * aur jalsa am men yeh arazi bataur hiba jahez men Naurang Khan ko de chuki hun * * * aur niz jahez men is arazi ka dena * * * sabi ho gaya hai.”

From the above it is, we think, perfectly clear that the intention of Mussammat Khairan was to carry out the bequest of Jiwa, the brother of Mussammat Rahmi, namely, to make a gift of the land in question, which was part of Jiwa's property, to his sister Mussammat Rahmi by way of dowry on the occasion of her marriage; and upon the proper construction of the order under consideration we are clearly of opinion that she (Mussammat Khairan) did carry out Jiwa's last wishes by making the gift solely for the benefit of Mussammat Rahmi, though as a matter of domestic arrangement dictated by obvious reasons of convenience she got the land entered (no doubt in consultation with and in pursuance of the advice of the male members of the family, namely, Naurang Khan and his father) in Naurang Khan's name. Such an entry, however, did not and could not in the least alter the real nature of the transaction, and could not therefore in the eye of the law amount to a gift of the land being made to and for the benefit of Naurang Khan, the husband of Mussammat Rahmi. In a case such as this we must look to the substance and not to the form of the mutation order, and looking at the proceedings before the revenue officer in that light nothing is more manifest than that Mussammat Khairan never intended to gift the land and did not gift it to Naurang, but that the gift having been made expressly by way of dowry it was to enure for the benefit of Mussammat Rahmi and her issue by Naurang Khan. She having died without issue, Naurang Khan is no more entitled to retain possession of the land than a third person would be as against the donor, who, the object of the donation having wholly failed, is *prima facie* entitled to recover possession thereof. It is not pretended that Naurang Khan has proved a custom applicable to the parties under which after the death of his wife Mussammat Rahmi he is entitled to retain possession of or to succeed to the land in suit; and in the absence of the proof of such a custom, the plaintiff's claim must, we think, be decreed (see *Chaughatta v. Mohkam Din* (1)).

For the above reasons we accept the appeal and pass a decree in plaintiff's favour for possession of the land in dispute with costs throughout.

Appeal allowed.

No. 55.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

SAHBI,—(PLAINTIFF),—APPELLANT,

Versus

NIAZ MUHAMMAD KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 258 of 1908.

Custom—Inheritance—Sister's right to succeed in preference to collaterals in the seventh degree—Afghans of mauza Nasran, tahsil Hoshiarpur.

Found that the plaintiff upon whom the *onus* rested had failed to prove a custom whereby among Afghans of mauza Nasran, tahsil Hoshiarpur, a married sister was entitled to succeed to the ancestral property of her deceased brother in the presence of his male collaterals of the seventh degree.

Further appeal from the decree of S. W. Gracey, Esquire, Additional Divisional Judge, Hoshiarpur Division, dated 27th November 1907.

Fazl-i-Husain, for appellant.

Shah Nawaz, for respondents.

The judgment of the Court was delivered by

JOHNSTONE, J.—In this case the sole question for decision is whether among the Afghans of mauza Nasran, tahsil Hoshiarpur, the married sister of a deceased intestate sonless proprietor is preferred, in the matter of succession to ancestral estate, to collaterals in the seventh degree. Both the Courts below have found against the sister, and, after hearing arguments, we are of opinion that the decision is correct. 14th Jany. 1909.

On neither side are there direct proofs of custom worthy of the name, and thus the question of *onus* is highly important.

We would lay the *onus* on plaintiff, deceased's sister, both on account of the provisions we find in the *Riwaj-i-am* and on account of the general trend of authority regarding the status as heirs of sisters and sisters' son. In the *Riwaj-i-am* of the Hoshiarpur tahsil, which is much more favourable to the sex than that of the other tahsils * of the District, while we find (Question 45) daughters excluding *karabatis* beyond the fourth degree, we also find (Question 54) sisters excluded by all *karabatis* without any specific mention of degrees. These provisions are very important, for here also

* e. g., In Garhshankar even *goti karabatis* exclude not only sisters but even daughters.

the matter is one of intestate succession and not one of the validity of a gift or will, a circumstance which differentiates this case from that dealt with in Civil Appeal No. 379 of 1904, relied upon by the learned counsel for the plaintiff.

We have to consider, then, what is the meaning of the word *karabati* in this particular *Riwaj-i-am*. Inasmuch as in Question 45 we find, in regard to the claims of daughters, a set of relatives described as *karabatis* up to fourth degree as having special rights, it is fair to infer that *karabati*, taken without any specification of degrees, includes a wider circle than agnates up to fourth degree; and this view is corroborated by the remarks in 98 P. R. 1891, of Plowden, J., who lays it down that the word, while it does not include perhaps absolutely all *yakjaddis*—the learned Judge takes as a *reductio ad absurdum* the case of a collateral in the thirteenth degree,—yet includes a wide circle to be defined in each case according to the sentiments and practice of the tribe concerned. This way of looking at the matter virtually supersedes the *dictum* of Powell, J., in 179 P. R., 1889, where it was laid down that *karabati* included no one beyond the descendants of deceased's great-grandfather. Perhaps the phrase *karabati-i-karib* might be interpreted in this way, but *karabati* is a different word—see 121 P. R., 1879, pages 362, 363.

At one time an attempt was made to assimilate the status of sisters to that of daughters, the argument being that the former were after all the *daughters* of the last male holder's father; but this attempt was finally defeated in 134 P. R., 1907 (F. B.), and it is now clear that sisters are always in a much lower position than daughters.

It is clear to us, then, that in the present case the *onus* is heavily on plaintiff to show (a) that collaterals in the seventh degree are too distant to compete successfully with her, and (b) that *karabati* does not include them. She has wholly failed to discharge this *onus*, and we do not think the matter requires any further discussion. We therefore dismiss the appeal with costs.

Appeal dismissed.

No. 56.

Before Mr. Justice Kensington and Mr. Justice Lal Chand.

DEVI DITTA SINGH,—(PLAINTIFF),—APPELLANT,

Versus

DROPTI,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1098 of 1906.

Custom—Inheritance—Brahmans of Rawal in the Rawalpindi tahsil—Right of collaterals to succeed in preference to a daughter—Hindu Law.

Held, that in matters of succession Brahmans of Rawal in the Rawalpindi District are governed by the general rules of agricultural custom and not by Hindu Law, and consequently daughters are excluded by near agnates of the last male proprior.

Further appeal from the decree of H. Scott Smith, Esquire Divisional Judge, Rawalpindi Division, dated 23rd December 1905.

Duni Chand and Pestonji Dadabhoi, for appellant.

Gobind Das, for respondent.

The judgment of the Court was delivered by—

KENSINGTON, J.—This is a revision under clause (b) of Section 30th Jany. 1907. 70 (1), Punjab Courts Act, admitted as an appeal on the question whether the parties are bound by Hindu Law or custom. We understand that the village is mainly owned by Brahmans and that both the Lambardars are of that caste.

The plaintiff is one of the six sons of Nihal Singh and the defendant is the daughter of another son. On the death of her parents she was, in 1889, entered as owner till marriage of her father's share of the family land. Four of the sons were then alive, so that the share at the time was one-fifth, but three of them have since died childless, so that there remain only the plaintiff and defendant recorded as owning the land half and half.

The defendant has recently married, and the plaintiff being in sole possession of the holding sues for a declaration that he is also sole owner, that is, for the removal of defendant's name. An allegation made by plaintiff that he has only recently come to know of the entry in defendants' favour must be untrue as he has all along lived in the village, and even if he did not openly join his brothers in consenting to the mutation entry of 1889 it is impossible that the matter should not have come to his notice on the occasion of successive alterations of the record as the remaining brothers died off.

The real explanation of the case now coming into Court appears to lie in the fact that recently some of the land was acquired by Government, and that the revenue authorities then followed the entries in the record (as they were bound to do) and divided the compensation money of Rs. 50 equally between the parties. Plaintiff then very naturally stirred himself to get defendant's name cut out.

The Lower Courts have concurred in holding the parties to be governed by Hindu Law and have thereon dismissed the suit, but it does not appear to us that the question has been discussed from the correct point of view.

The mere fact that certain rulings of this Court can be quoted in favour of applying Hindu Law to communities of Bedis, Khatries or even Brabmans elsewhere is not very material. Nor again are the four instances quoted from the Rawalpindi District of any real assistance to the defendant. Three of them are not in point at all as the Divisional Judge has himself recognized, and the fourth (*Gurmukh Singh v. Gurdas, etc.*, decided by Mr. Chevis, Divisional Judge, on the 16th June 1902) dealt only with the question how far collaterals had a customary right to contest on alienation.

There is no reason to doubt that the village here concerned is owned by Brahman agriculturists, though some of the proprietors eke out a living by taking service. Villages of the kind are common in many parts of the Punjab, both in the plains and hills, though perhaps less so in the northern parts of the Province, and customary law is commonly applied to them without question in matters of inheritance. We can see no reason why this particular Brahman village should be exceptionally treated. The fact that when defendant's name was originally entered, it was stipulated that she should be considered a proprietor only till marriage raises a very strong presumption that the family never thought of applying Hindu Law to themselves while it is most unlikely that the village would remain isolated from its neighbours which are similarly situated except as regards the caste of the proprietors, and that it either could or would set up a foreign code of law in opposition to the wellnigh universal custom of agriculturists. We use the word 'foreign' advisedly as it is notorious that Brahman villagers, as opposed to residents in towns, are nearly as ignorant of the rules and practice of Hindu Law as other Punjabi peasants.

The Lower Courts appear to us to have started with the wrong assumption that the parties being Brahmins are governed

by Hindu Law unless the contrary is proved. We would reverse the position and say that custom applies in the absence of clear proof to the contrary. It follows that, there being no sort of proof of the kind, the plaintiff's claim should succeed.

As minor matters leading up to the same conclusion we note that it is admitted that the defendant has received no share in the profits of the land since her marriage, saving the land acquisition money, and that no instance can be quoted in the village of a daughter excluding near collaterals from inheritance. The ruling in *Mohan Lal v. Devi Das* ⁽¹⁾ is also in plaintiff's favour, and we fail to understand why the Lower Appellate Court thinks it inapplicable. It is so far directly in point that it concerned agricultural Brahmans, though not of the same district. We entirely agree in the conclusion then arrived at that Brahmans, who follow the plough, commonly accept custom though they may make vague and pretentious allusions to the Dharmshastra (such as have actually been made in the present plaint) without clear understanding of what they mean.

We think the case so clear that we are justified in accepting the appeal and reversing the decrees of the Lower Courts. The plaintiff is given a decree for the declaration claimed, with costs throughout.

Appeal allowed.

No. 57.

Before Mr. Justice Kensington and Mr. Justice Chevis.

KHAIRU,—(DEFENDANT),—APPELLANT,

Versus

FAKIR CHAND AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1167 of 1907.

Marriage—Validity of a chadar andazi marriage between a Minhas Rajput and a Mahajan woman of Gujrat District—Legitimacy of children of such marriage.

Held, that a chadar andazi marriage between a Minhas Rajput and a Mahajan woman of the Gujrat District is valid, and the son of such a marriage is entitled to succeed to the estate of his deceased father.

Further appeal for the decree of Rai Narain Das, Additional Divisional Judge, Jhelum Division, dated 19th August 1907.

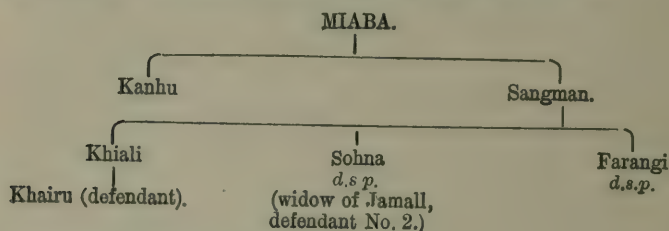
Nanak Chand, for appellant.

Sham Lal, for respondent.

The judgment of the Court was delivered by —

2nd June 1908.

CHEVIS, J.—The genealogical tree, so far as it is necessary to give it for purposes of this appeal, is as follows :—



min91 Plaintiffs are descendants of Kanhu.

min91 The parties are Minhas Rajputs of the Gujrat District. Khairu's mother was a Mahajan woman. According to Khairu she married Khiali by *chadar andazi*, the union is a valid marriage, and he is the issue and is lawful son and heir of Khiali. According to plaintiffs, who sue for possession of the property, there was no *chadar andazi*, and a union between a Rajput and a Mahajan woman is unlawful and the issue of such a woman has no right of inheritance.

The First Court decided in defendant's favour and dismissed the suit. The Additional Divisional Judge held the union to be invalid, but gave plaintiffs a decree for five-sixth only, leaving Khairu one-sixth for maintenance.

Khairu appeals, urging that the union was a valid marriage, and that Fakir Chand, plaintiff No. 1, had admitted him to be lawful son and heir of Khiali; also that a suit for possession cannot lie in the lifetime of Mussammat Jawali.

The evidence proves beyond any reasonable doubt that Mussammat Bhakhan married Khiali by *chadar andazi*, and that the pair lived together as man and wife for many years. A daughter of the union was married to a Chib Rajput. Khairu was also born from this union. That there was not a regular *chadar andazi* has only been asserted in a half-hearted manner, and we have no doubt whatever that a regular *chadar andazi* form of marriage was gone through. We have to see if such a union is valid.

According to appellant's counsel Mahajans are Khatris, but respondents' counsel asserts that they are Karars and are Vaisyas and not Kshatriyas.

So the woman in this case either belonged to the same primary caste as Khiali or to the next lower caste. If she belonged to the same caste, the union would not be invalid according to Hindu Law. See *Haria v. Kanhya* (1), in which the whole question is fully and most ably discussed by Chatterjee, J. But it would be rather an extension of that judgment to say that a marriage between a Rajput and a woman of the Vaisya caste is legal. The fact is that that judgment does not discuss the question whether such a union would be valid or not; the only question in that judgment was, whether a Rajput could marry a Khatrani; there is nothing in the judgment to say that he could not marry a woman of a lower caste. One general rule seems to be established, viz., that ordinarily a woman may not marry a man of a lower caste than herself. In Mayne's Hindu Law, 7th Edition, we find (paragraph 88) "The prohibition against marriages between persons of different castes is comparatively modern. Originally marriages between men of one class and women of a lower, even of the Sudra class, were recognized. All the writers allow marriages between a Sudra woman and a Kshatriya or Vaisya, but there is much conflict as to marriages between a Brahman and a Sudra woman. It seems, however, to have been always admitted that a Sudra man could not lawfully marry a woman of a higher class than his own." Paragraph 89 says "Marriages between persons of different classes are long since obsolete, no doubt from the same process of ideas which has split up the whole native community into countless castes which neither eat, drink, nor marry with each other." So mixed marriages seem to have become obsolete rather by custom than by any positive prohibition of personal law. But turning again to *Haria v. Kanhya* (1) we find the following: "We have said already that in the Punjab caste restrictions are more lax than elsewhere in India, that is to say, the old Aryan customs survive here more than in other parts of India." So it is impossible to say that mixed marriages are entirely obsolete in this part of India; and mixed marriages have been upheld in several reported cases of this Court, e. g., in *Ralla Ram v. Asa Ram* (2) a marriage between a Brahman, and a Rajputni was upheld, and

(1) 72 P. R., 1908.

(2) 48 P. R., 1890.

in *Sahib Ditta v. Bela* (1) a marriage between a Jat and a Brahman woman was even upheld (though this latter case seems rather against the general principle that a woman cannot marry a man of a lower caste than her own and appears to have overlooked *Nathu v. Gokal* (2) and *Pirithi Singh v. Bhola* (3), So it cannot be said that mixed marriages have not been recognized in former judgments of this Court (at all events so far as a marriage of a man to a woman of a lower caste is concerned).

So we must now look to this particular case to see if the marriage is forbidden by custom.

Stress has been laid on the *Riawj-i-am* (question 7) where the answer to the question whether issue succeed in the case of a marriage with a woman with whom marriage is unlawful, e. g., a dancing girl or prostitute or woman of *Ghair Kaum*, was, by some tribes, that the son got no share unless the father turned a Muhammadan, while other tribes said that such unions did not occur. But the form in which this question is put prevents us from paying any regard to the answer. If the woman is one with whom marriage is unlawful, how can the issue possibly count as legitimate? The whole question to be decided in each case is whether there can be a lawful union with the particular woman.

Turning to the *Riawj-i-am* of the neighbouring district of Sialkot, we find it laid down that a Hindu cannot marry a woman of a different caste, which is surely a sweeping assertion. The only instances quoted in support are *Pirithi Singh v. Bhola* (3) and *Nathu v. Gokal* (2), both cases in which the marriage was between a Brahman woman and a man of lower caste; such cases do not prove that a woman cannot marry a man of higher caste.

Instances that a Minhas Rajput can marry a woman of another caste, and that in such cases the children do succeed, have been given by plaintiff's witness Bakhtar (see page 5 of the paper book), and the fact that they are instances of the Sialkot District does not entirely destroy their value. The following circumstances too are, in the present case, most significant. In 1903 Khiali died, and the Patwari reported the case and mutation in favour of Khairu followed in due course. Next year the only surviving widow of Farangi

(1) 50 P. R., 1900.

(2) 57 P. R., 1893.

(3) 29 P. R., 1882.

died, and again Khairu got mutation. Fakir Chand, plaintiff No. 1, is a Lambardar, and even if he did not actually assent to mutation in Khairu's favour on both occasions, the fact remains that he must have known what was going on and that neither he nor any other of the plaintiffs (who all live in the village) made any objection to the mutation. It was not till 1906 that the present suit was brought; till then Khairu was allowed to remain in unchallenged possession of the lands of both Khiali and Farangi. Surely the mutations would have been objected to had Khairu not been regarded as the lawful son and heir of Khiali? This coupled with the fact that Khairu and his sister have both married into respectable families, seems to us to leave no doubt that the community never had the least doubt as to the legality of the marriage of Khairu's parents. Without laying down any general rule to the effect that a marriage between a Punjabi of the Kshatriya caste and a woman of a lower caste is always valid, we hold that in this particular case the marriage was a lawful one, even supposing for the sake of argument that the woman was of Vaisya caste.

We, therefore, accept the appeal, and reversing the decree of the Lower Appellate Court, we dismiss the suit with costs throughout.

Appeal allowed.

No. 58.

Before Mr. Justice Johnstone.

PRABH DIAL,—(PLAINTIFF),—APPELLANT,

Versus

BUKSHI RAM,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 25 of 1909.

Custom—Alienation—Hindu Law—Saihgul Khattries of Jullundur City.

Held, that Saihgul Khattries, though owning some land in Jullundur City, are not governed by agricultural customs in matters of alienation but by Hindu Law.

Also that, the initial presumption in regard to Khattries is that they follow Hindu Law and not agricultural customs.

Further Appeal from the decree of M. L. Waring, Esq., Divisional Judge, Jullundur Division, dated the 12th November 1908.

Shelverton, for appellant.

The judgment of the Court was as follows :—

13th Feby. 1909.

JOHNSTONE, J.—I have gone carefully through the files and have heard Mr. Shelverton's arguments. The parties are Saihgal Khattries. Ordinarily, as this Court has repeatedly held,—Khattries are not agriculturists, and the *initial* presumption regarding them is in all cases that they follow not agricultural custom but Hindu Law. But Mr. Shelverton urges that the Saihgals are on a different plane from ordinary Khattries. He says they came from the Deccan and settled in Damodarpur, District Jullundur, which village they own in full; that in that village they have adopted agricultural custom; and that the Jullundur City Saihgals are mere offshoot from Damodarpur, and so should be deemed until the contrary is proved to follow that custom still. I find some difficulty in accepting this position. These Saihgals have been very long settled in Jullundur City, and there is no evidence worthy of the name that they ever came from Damodarpur. It is just as probable, in fact more probable, that they first came to Jullundur City, and then a branch of them acquired Damodarpur and settled down there as a compact village community. *There* no doubt agricultural custom may have been adopted. As frequently pointed out by myself and other Judges of this Court, non-agriculturists, who settle down in a compact village community, would, naturally after a time, adopt the same devices to exclude strangers, which the Jats have adopted, but the case of the Khattries in a city is different. In Jullundur City the Khewatdars are not all Khattries, much less all Saihgals: many tribes and castes hold land; therefore, I would hold that, inasmuch as the migration of these Saihgals from Damodarpur is merely a matter of conjecture, and inasmuch as these Saihgals, though owning some land in Jullundur City, do not themselves cultivate it and are apparently not mainly dependent upon agriculture for their livelihood, the presumption is against their following Jat custom.

To rebut this presumption appellant can show little or nothing. The oral evidence is worthless by itself. Not one case of successful objection to an alienation in Jullundur City by a Khattri on the basis of custom has been proved though alienations have been very numerous. And in two judgments of 1888 and 1896 respectively, in which many previous instances are relied upon, it was expressly held that these Khattries follow Hindu Law.

For these reasons I decline to summon the respondent, and I dismiss the appeal.

Appeal dismissed.

No 59.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

SRI RAM, MAJOR, AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus.

RAMJI DAS AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 829 of 1907.

Custom—Mortgagee rights—Right of mortgagee's heirs to contest alienation of those rights—Ancestral land—Land purchased by one of the descendants from another descendant of a common ancestor.

Held, that for the purpose of the customary law of this Province mortgagee's rights do not amount to such rights in the land charged as would give the mortgagee's heirs a right to contest an alienation of those rights.

Held also, that when a mortgagee purchases the equity of redemption in respect of the land mortgaged, the mortgagee rights merge in the rights of ownership.

Held further, that land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor.

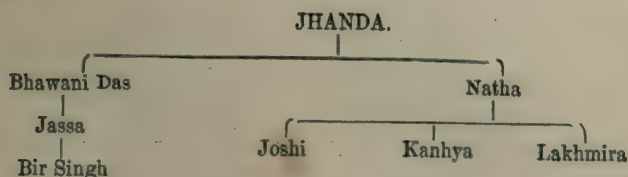
Further appeal from the decree of C. L. Dundas, Esqr., Divisional Judge, Ambala Division, dated the 18th April 1907.

Dwarka Das, for appellants.

Shadi Lal, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The pedigree table of the parties is as follows :—



The land in dispute was originally half of the estate held by the common ancestor Jhanda. Upon the death of the latter it descended to Natha, one of his sons, the other half descending to Bhawani Das, the other son.

It appears that after Natha's death, Joshi, Mussammat Pardhani (widow of Kanhya) and Lakhmira mortgaged the land in suit in favour of Jassa, and the mortgagee rights of the latter descended upon his death to his son, Bir Singh. Subsequently to this Joshi, Mussammat Pardhani and Lakhmira sold the equity of redemption in respect of the said lands to one Kahna, by deed of sale, dated 7th December 1897. Bir Singh thereupon sued for pre-emption in respect of the said sale, and was granted a decree. He thus became full owner by purchase of the land. On the 9th October 1899 he mortgaged the land for Rs. 1,000 in favour of one Ramji Das, and the present claim is preferred by Bir Singh's sons who ask for a declaration to the effect that the said mortgage shall not affect their rights after the death of their father. The suit is obviously collusive, and there can be little doubt that Bir Singh is attempting, through his sons to defraud Ramji Das, the mortgagee, of his rights under the said mortgage.

The First Court decreed the claim, but this decision was reversed on appeal by the Divisional Judge who held that the land was not ancestral property within the meaning, and for the purposes, of customary law, and that consequently Bir Singh's sons had no power to restrict its alienation by their father.

Plaintiffs have preferred a further appeal to this Court, and the two questions which we have to decide are, (1) whether the mortgagee rights inherited by Bir Singh from his father constitute "ancestral immoveable property" so far as Bir Singh's sons are concerned; and (2) whether from the mere fact that the land was originally held by the common ancestor, Jhanda, it retains its character of ancestral land even after its purchase by Bir Singh. In our opinion, both questions must be answered in the negative.

For some purposes the right of a mortgagee in land over which he has a charge may be "immoveable property" within the definition of that expression as given in the General Clauses Act, 1897. But from the point of view of customary law, we do not think that the rights of a mortgagee can be regarded as "land." The ordinary *zimindar* knows nothing of the definition of immoveable property as given in the General Clauses Act, and it would, we think, be to him a novel and startling proposition that the rights of a mortgagee to whom land is hypothicated (for he knows nothing of a mortgage in English form),

constitute *per se* the land itself. Lands to the agricultural classes of this province, means one thing; money charged upon land means to them something very different, and we know of no case in which a suit has been brought under the customary law by reversionary heirs to restrict a mortgagee from alienating his rights under the mortgage. We have no hesitation, therefore, in holding that, *for the purposes of the customary law of this province*, a mortgagee's rights do not amount to such rights in the land charged as would give the mortgagee's heirs a right to contest an alienation of those rights. It is not denied that the mortgagors in this case could have paid off Jassa or Bir Singh, and if they had done so, and if Jassa or Bir Singh had thereupon spent the money so received from the mortgagors we know of no authority which would have justified a suit by the present plaintiffs to restrain Jassa or Bir Singh from dealing with the money as they pleased.

But this question scarcely arises in the present case. Admittedly Bir Singh, by means of his pre-emptive suit, acquired by purchase the equity of redemption in respect of this land, and as he was the original mortgagee, his former rights as mortgagee merged in the rights of ownership of the land which he acquired when he bought the equity of redemption. A man cannot have a mortgage in his favour over his own property, apart of course from those cases (not here applicable) in which a person may keep alive a mortgage as protection against other incumbrancers. With this latter class of cases we are not here concerned, and the only question in this connection is, whether the land purchased by Bir Singh remained ancestral land in his hands after this purchase, simply because it had originally belonged to the common ancestor. We do not think so. In our opinion land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent or by reason merely of his connection with the common ancestor. In the present case Bir Singh purchased the land with his own money and it has come into his possession not because he is one of the descendants of Jhanda, but because he has bought it from the persons who would otherwise be entitled to hold it. It is possible, of course, that even if he had not purchased it, it might in the course of time have devolved by descent upon him or his heirs. The Divisional Judge states that there is nothing to show that there was any chance "of his ever succeeding to it by inheritance," but be this as it may, the fact remains that he has acquired it not because he is a member of

Jhanda's family, but because he has paid money for it and purchased it just in the same manner that a total stranger might have bought it.

The cases cited by Mr. Dwarka Das do not help his argument. In *Natha Singh v. Harnam Singh* ⁽¹⁾ the land in question came into the possession of one Sham Singh by reason of its abandonment, by a very near relation, and the learned Judges stated that they did not think this particular "land" (which originally belonged to a common ancestor) "was removed from the category of ancestral property, merely "because it came to Sham Singh owing to the abandonment of it by a near relation rather than by simple inheritance." It was only by reason of his descent from the common ancestor that Sham Singh in that case acquired the land, and obviously in such circumstances, it remained ancestral land in his hands.

Mussammot Fatto and Lalan v. Nizam Din, ⁽²⁾ is even less in point. It was there held that land which has reverted to a donor's line upon failure of the lineal descendants of the donee, becomes once again ancestral land in the hands of the donor's descendants. Clearly in such a case, the donor's descendants acquire the land by *descent*, and Plowden, S. J., expressly states in his judgment that this was the *ratio decidendi*.

The third case cited by Mr. Dwarka Das, *Haider Khan v. Jahan Khan* ⁽³⁾ is, in point of fact, fatal to his contention, for it was held in this case that when property, which had once been held by a common ancestor, had passed out of the possession of the family, but had been subsequently acquired by a member of that family who was not in the position of a common ancestor, such property could not be regarded as "ancestral property" in the sense that that expression is understood in the customary law.

We hold, therefore, that the land mortgaged by Bir Singh to Ramji Das was not ancestral, and that, therefore, the plaintiffs have no *locus standi* to contest the alienation.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

⁽¹⁾ 31 P. R., 1894.

⁽²⁾ 10 P. R., 1893.

⁽³⁾ 50 P. R., 1902.

No. 60.

*Before Sir William Clark, Kt., Chief Judge.*DARYA DITTA AND ANOTHER (PLAINTIFFS),
PETITIONERS,*Versus*

MANA SINGH (DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Case No. 1023 of 1908.

Decree in contravention of the Punjab Land Alienation Act, 1900—Effect of—

Held, that a decree passed in violation of the terms of Section 3, clause (2) of the Punjab Land Alienation Act, XIII of 1900, is not a nullity. Section 9 of Punjab Act, I of 1907, amending the Punjab Land Alienation Act, 1900, provides for such a case.

Petition under Section 70 (1) (b) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the decree of T. J. Kennedy, Esquire Divisional Judge, Ferozepore Division, dated the 12th December 1907.

Sheo Narain, for petitioners.

The judgment of the learned Judge was as follows :—

CLARK, C. J.—Plaintiff sued for possession of certain land on the strength of a conditional sale, and defendant compromised the case receiving a money-payment, and a decree for possession of the land was passed on 18th May 1903, and possession was given to plaintiff in execution of decree on 3rd August 1904. Plaintiff now sues again for possession, alleging a subsequent ouster from the land by defendant. 18th Dec. 1908.

Plaintiff is a non-agriculturist, and defendant is a member of an agricultural tribe.

Under Section 3, clause (2) of the Punjab Land Alienation Act a permanent alienation of land shall not take effect until sanction is given by the Deputy Commissioner.

The Courts below have on this ground treated the decree of 18th May 1903 as a nullity and have dismissed plaintiffs' suit.

The fact that that decree was passed in violation of the terms of the Punjab Land Alienation Act does not render it a nullity. The decree was open to appeal or revision, but unless set aside, it cannot be treated as a nullity. It was not a decree passed without jurisdiction.

This defect here noticed is provided for by Section 9 of Act I of 1907, amending the Punjab Land Alienation Act. This section provides that every Civil Court passing a decree involving the permanent alienation of his land by a member of an agricultural tribe shall send a copy of its decree to the Deputy Commissioner, and it provides for the Deputy Commissioner intervening when a decree has been passed contrary to the provisions of the Act, and this provision applies to decrees passed before as well as after the coming into force of the section. I accept this revision and set aside the orders of the Courts below dismissing plaintiffs' suit and remand the case for disposal under Section 562, Civil Procedure Code.

Probably the best course for the Divisional Judge to pursue would be to bring the decree of 18th May 1903 to the notice of the Deputy Commissioner, and await, for the prescribed two months, any action taken by him under Section 21A of the Act. If he takes action, the course of this suit will be determined by any alteration made in the decree of 18th May 1903.

If he takes no action, the suit must be disposed of on the understanding that the decree of 18th May 1903 is a valid decree.

Court-fee on this revision will be refunded. Other costs will be costs in the case.

Revision allowed.

No 61.

Before Mr. Justice Reid.

RALLA,—(DEFENDANT),—APPELLANT,

Versus

APPELLATE SIDE. }

JAWAHIR SINGH AND OTHERS,—(PLAINTIFFS),—AND
LABH SINGH AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 660 of 1908:

Custom—Succession by adopted son to the collaterals of adoptive father—Kang Jats of the Daska tahsil, District Sialkot.

Held, that the defendant, the adopted son, on whom the onus lay, had failed to prove a custom by which an adopted son inherits to the collaterals of his adoptive father among Kang Jats of the Daska tahsil, District Sialkot.

Further Appeal from the decree of Sheikh Asghar Ali, Additional Divisional Judge, Sialkot Division, dated the 21st February 1908.

Vaughan, for appellant.

The order of the learned Judge was as follows:—

REID, J.—I see no reason for interference. The question for 7th January 1909. consideration is whether Kang Jats of the Daska *tahsil*, Sialkot, allow an adopted son to inherit to the collaterals of his adoptive father. The burden of proof was on the defendant, the adopted son.

He cited no instance and relied on *Makhan Singh v. Dulo*, (1) in which it was held that the custom set up existed among Chiman Jats of the same *tahsil*, and on answer to question 75 of the customary law of the district which is not supported by instances. *Makhan Singh v. Dulo* (1) has been differed from in Civil Appeal 60 of 1906 (2), after exhaustive inquiry, and in any case the ruling relied on does not specifically apply to Kang Jats, and no evidence or authority that both tribes are governed by the same custom in this respect has been cited. I concur with the Lower Appellate Court in holding that the burden of proof has not been discharged. There is no force in the contention that the Lower Appellate Court has not disposed of all the points in appeal before it. The existence of the custom set up was the crucial point, and with it went the defendant's whole case.

I dismiss the appeal under Order XLI, Rule 11 of the Code of Civil Procedure.

Appeal dismissed.

No. 62.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

MANGHA RAM (PLAINTIFF), APPELLANT,

Versus

MENGHA RAM AND ANOTHER (DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 883 of 1907.

Punjab Pre-emption Act (No. II of 1905), Section 11, Part II,—word "tribe" Pre-emption claimed by an Arora of a different tribal sub-division to vendor.

Held, that the word "tribe" in Section 11, Part II of the Punjab Pre-emption Act 1905, covers the whole group of Aroras in the village who satisfy the conditions laid down in that section.

(1) 4 P. R., 1906.

(2) 50 P. R., 1908.

Further appeal from the decree of Sheikh Asghar Ali, Additional Divisional Judge, Multan Division, dated 4th April 1907.

Sohan Lal, for appellant.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

26th Feby. 1909.

ROBERTSON, J.—The only questions which we have to decide in this case are :—

(1) Are the Aroras to be considered a “tribe” within the meaning of the word as used in the second part of Section 11 of the Pre-emption Act, and (2) if so, is the “tribe” to be held to consist of all the Aroras, at any rate of one district, or of each the various sub-divisions separately? The question arises in a claim for pre-emption brought by an Arora of the Kukreja sub-division against another Arora of the Gidar sub-division, who is the vendor, the vendee being a stranger to the village and an Arora of the Sibra sub-division. It is admitted that the plaintiff fulfils the conditions laid down in the second half of the second clause of Section 11.

As regards the second point which we may dispose of first, we are in no doubt. If Aroras come within the definition of “tribe” in Section 11, Part II, we have no hesitation in finding that the whole body of Aroras, and not the sub-division forms the unit or “tribe.” Nothing whatever has been brought to our notice which leads us to hold that each of the sub-divisions of Aroras constitute anything which could be called a tribe under any possible interpretation of the term. If the word “tribe” covers the section of society to which the plaintiff belongs, it would apply certainly to the whole of each of the two great sub-divisions into which Aroras are divided, as a whole.

As regards the use of the word “tribe” in Section 11, Part II, we have no intention of entering into any abstruse discussion as to the origin of the word “tribe” in the old Roman days nor into its scientific, ethnological or ethnographical meaning. We confine ourselves to the question of its meaning as regards Aroras in Section 11, bearing in mind that it can only apply in each particular case to a very small number of persons, in a circumscribed area of small dimensions, i.e., an agricultural Punjab village. We think Section 11 is clearly intended to protect the members of any small community of persons located in a village who do not belong to any tribe gazetted as an “agricultural tribe” under Section 4 of the Land Alienation Act. Such small communities might consist

of agriculturists of a class too small, or of two little importance to be treated by notification as an agricultural tribe, but we cannot agree with Mr. Sheo Narain that it would only cover the case of such agriculturists, or quasi agriculturists and not the case of Aroras, or classes more given to trade than agriculture. We are not concerned here with what it does not cover, and we do not propose to be led into any such general discussion. We find in the village in question, a small body of Aroras, some of whom come within the purview of the second half of Section 11 of the Pre-emption Act, and, having in view the scope and effect of that Act, we hold that the word "tribe" in Section 11, Part II is intended to cover, and does cover, the whole group of Aroras in the village who satisfy the conditions laid down in that section.

We therefore accept the appeal and restore the order and decree of the First Court. Costs in this and the Divisional Court against the respondents.

Appeal allowed.

No 63.

Before Mr. Justice M. Shah Din.

MOHKU (DEFENDANT),—APPELLANT,

Versus

KARAM, &c., (PLAINTIFFS),—RESPONDENTS.

Side.

Civil Appeal No. 1248 of 1908.

Custom—Alienation—Gift by sonless proprietor to pichhlag—locus standi of distant collaterals to contest its validity—Gondals of mauza Isar, tahsil Bhera, District Shahpur.

Held, among Gondals of mauza Isar, tahsil Bhera, District Shahpur, that having regard to the fact that the village community is a compact body of proprietors all descended from one common ancestor, that the tribal custom of the Shahpur District is against the gift, and that the donee as a pichhlag is a perfect stranger to the donor, collaterals in the eighth degree from the donor, a sonless proprietor, have a *locus standi* to contest the gift and the onus of proving that the gift is valid by custom lies on the donee.

Held, also, that the donee had failed to prove that the gift is valid by custom.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Shahpur Division, dated the 7th January 1908.

Gokal Chand, for appellant.

Muhammad Iqbal, for respondent.

The judgment of the learned Judge was as follows:—

2nd March 1909.

M. SHAH DIN, J.—The main question for decision in this appeal is whether among Gondals of *manza* Isar, *tahsil* Bhera, Shahpur District, a childless proprietor has power, under custom, to make a gift of his ancestral land in favour of the *pichhlag* son of his wife, and whether collaterals related to him in the eighth degree can contest such an alienation.

The Lower Appellate Court has found as a fact that the property in suit is ancestral, and this finding cannot be contested before me, as this appeal is one admitted under Section 70 (1) (b) of the Courts Act.

On the question whether the gift in dispute is or is not valid by custom, the first important point to note is that by far the largest portion of the land gifted, *viz.*, 447 *bighas* out of a total area of 503 *bighas*, was in possession of Mussammatt Fazlan on the usual widow's estate, and it cannot be seriously contended that she had any power to make a gift in respect of that land in favour of the appellant. There then remains the question of Fazl's right to gift away the land in his possession to Mohku who was his *pichhlag* son, and was not at all related to the donors' family. On this part of the case the only serious contention raised in the Courts below, and repeated before me, is that the plaintiffs being related to the donors in the seventh and eighth degrees from the common ancestor, the *onus* lay upon them to show that they had power to contest the gift in dispute. I think that this contention cannot be allowed to prevail in this case. In Wilson's Code of Tribal Custom, Shahpur District, page 73, it is laid down that among Gondals a proprietor cannot, without the consent of the agnate heirs, make a gift of immovable property to a person not related to him. In this respect the custom of Gondals is different from that of Awans, among whom, as noted in the said Code, the power of alienation possessed by a childless proprietor is practically unrestricted. Next, we have to consider in this connection the peculiar constitution of the village in which the land in suit is situate, and that shows, as the Courts below have pointed out, that the original tribal bond of the proprietary body has not been broken by the introduction of strangers save and except two landowners, one a Khattri and the other a Sahla, who between them hold a small area of 34 *bighas* only. The village community is thus a compact body of proprietors, all belonging to one tribe and descended from one common ancestor Isar, who was the original founder of the village and after whom it is named. Having regard,

therefore, to the constitution of the village and to the record of custom applicable to the parties as above referred to, and considering also that the donee in this case is a perfect stranger, being in no way related to either of the donors, I am clearly of opinion that the plaintiffs, although they are distant collaterals of Fazl, being eight degrees removed from the common ancestor, have a *locus standi* to contest the gift in question, and that the onus lies on the defendant-donee of proving that the said gift is valid by custom.

The counsel for the appellants relies on *Natha Singh v. Mohan Singh* ⁽¹⁾ and *Hira v. Karam Kaur* ⁽²⁾ to show that the plaintiffs are too remotely related to the donor Fazl to have the power to contest the gift. Those decisions, however, proceed upon the special facts of the cases before this Court, and in no way contravene or question the correctness of the principle laid down in a series of decisions, most of which are noticed in *Khazan Singh v. Relu* ⁽³⁾ that among agricultural tribes in this province there is no fixed limit of propinquity up to which the kinsmen of a sonless proprietor are to be presumed to have the right to impeach alienations of ancestral land by him, but beyond which they cannot be presumed to possess such power. Each case has to be decided in the matter of the *locus standi* of collaterals to contest an alienation by a childless proprietor according to its own particular facts, and no hard and fast rule applicable to all conceivable circumstances and to all tribes and localities can be laid down.

(See also *Bhole v. Man Singh*, pages 407-408) ⁽⁴⁾.

In the present case the plaintiffs have, in view of the facts I have mentioned above, the power to challenge the validity of the gift in dispute, and the only question that remains to be decided is whether the donee has shown that the gift is authorized by custom. He has produced some oral evidence in support of that position, but none of his witnesses has cited a single instance of such a gift having been made before, and no judicial precedent showing the validity of this kind of alienation has been mentioned at all.

The statement of custom in Wilson's Code referred to above is against the donee's contention, and so is a published decision of this Court, namely, *Futteh-ud-Din v. Jallu* ⁽⁵⁾ which,

⁽¹⁾ 93 P. R., 1906.

⁽²⁾ 23 P. R., 1907.

⁽³⁾ 35 P. R., 1906.

⁽⁴⁾ 86 P. R., 1908.

⁽⁵⁾ 70 P. R., 1896.

though the plaintiff, in that case were near agnates of the sonless proprietor concerned, is a distinct authority for the present respondents' contention that Fazl's power of alienation is not unrestricted.

I hold, therefore, that the donee has failed to prove that the gift made in his favour by Fazl and Mussammat Fazlan is valid by custom, and maintaining decree of the Lower Appellate Court, I dismiss this appeal with costs.

Appeal dismissed.

No. 64.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

JIWANA, &c.—(DEFENDANTS),—APPELLANTS,

Versus

ABDULLAH, &c.—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 18 of 1908.

Custom—Alienation—Declaratory suit after the death of alienor in the life time of the widow—Punjab Limitation Act, 1900, Article 1.

Held, that where a suit for possession is impossible owing to the presence of females entitled to hold, for life, a suit on the part of the reversioners for a declaration to the effect that an alienation by a sonless proprietor shall not affect their reversionary rights is maintainable notwithstanding that the alienor is dead at the time when the suit is brought.

Held also, that Article 1 of the Punjab Limitation Act is applicable to such a suit.

Further appeal from the decree of W. Le Rossignal, Esquire, Divisional Judge, Amritsar Division, dated, the 4th December 1907.

Zia-ud-Din, for appellant.

The judgment of the Court was delivered by—

ROBERTSON, J.—There is a point of some interest in this case connected with the Punjab Limitation Act.

In this case, the alienor of certain property died after making an alienation of certain land on 21st October 1897.

The plaintiffs are his reversionary heirs and they come within 12 years of the alienation and its mutation, and file a suit for a declaration that the alienation shall not affect their rights after the death or marriage or re-marriage of the woman whose rights to hold for life they recognize.

The question is—Will this suit lie, and if so, what is the period of limitation fixed for it?

APPELLATE SIDE. {

4th March 1909.

Now two things are clear. The first is that, although the alienor is dead, the suit is really one for a declaration that the alienation shall not affect the rights of the plaintiffs from the death of the alienor. They recognize that certain female life-renters intervene between them and possession, but it is the power of the alienor to alienate *his* rights beyond his own life-time, not any question of alienation by the present holders for life, which is in question. Whether the alienation had been made or not made, the rights of the women in question would have equally intervened between the plaintiff and his rights to possession from the death of the alienor. The form of the suit is immaterial, this is clearly its essence, and we do not think it can be held that a right holding reversioner cannot claim a declaration that an alienation shall not affect his rights after the death of the alienor, merely because the alienor dies before the suit is brought, and a suit for possession is impossible owing to the presence of females entitled to hold for life. It is true that following *Miran Bakhsh v. Ahmad* ⁽¹⁾ with which we entirely agree, a suit for possession could be brought within 12 years of the death or remarriage of the female life-renters. But this may not occur for many years, and we see no reason why this declaratory suit should not lie merely because the alienor happens to be dead already. The policy of the legislature clearly is to have such questions settled within a reasonable period from the transaction impugned. The Limitation Act says : "Suit under the customary law of the Punjab by a son or reversioner of a male proprietor to have an alienation of ancestral land made by him declared void except for the life of the alienor."

It is not necessary under this clause that the alienor should himself be alive.

The suit was brought after the new Act came into force and before the declaratory suit was barred by limitation. Clearly, therefore, the suit comes within the purview of any new Act of limitation which may have extended the period of limitation. The authorities as to this are unanimous, and the period for the suit was 12 years from the dates specified in the schedule of the Punjab Limitation Act. The law on the point is well summarized in *Rivaz on Limitation*, page 5 : "If when a suit is brought the claim would be barred under the provisions of the repealed Act but is within time under the more

(¹) 145 P. R., 1907.

favourable conditions of the new enactment, there can be no question that the suit is in time." We have no hesitation whatever as to the correctness of this view, and no attempt was made to quote authority against it.

We find, therefore, that the suit is in time, and reject the appeal with costs.

Appeal rejected.

No. 65.

Before Mr. Justice Johnstone.

ATTAR SINGH,—(OBJECTOR),—PETITIONER,

Versus

BHAGWAN DAS,—(DECREE-HOLDER),—RESPONDENT.

Civil Revision No. 1558 of 1908.

REVISION SIDE.

Civil Procedure Code (1882), Section 266, clause (c)—Meaning of—Attachment of an unused khurli.

Held, that the words "belonging to" in clause (c) of Section 266, Civil Procedure Code (1882), are not synonymous with the words "occupied by;" the latter words are not a mere repetition, but they qualify the former words. "Occupied by" means "lived in by" or "used for agricultural purposes by," and therefore a *khurli*, in which the judgment-debtor does not live and which at the time of attachment was not being used by him for any purpose whatever, is liable to attachment.

Petition for revision of the order of A. Latifi, Esquire, District Judge, Amritsar, dated 20th February, 1908.

Fazal Elahi, for petitioner.

Devi Dyal, for respondent.

The judgment of the learned Judge was as follows:—

13th Feby. 1909.

JOHNSTONE, J.—I can see no force in this petition. It seems to me practically certain that the judgment-debtor here has now no land whatever under his own cultivation and owns no cattle. Most of his land is mortgaged with possession, perhaps all of it. It was said that some 6 *bighas* was free of mortgage, but it is certain that at all events it was not, at time of the attachment of the *khurli*, under cultivation of judgment-debtor, and he certainly had no cattle.

The exemption is stated in Section 266, Civil Procedure Code (1882), as exemption of materials of houses and other buildings "belonging to and occupied by agriculturists." The

words "belonging to" are not synonymous with "occupied by"; the latter words are not a mere repetition, but they qualify the former words. "Occupied by" means "lived in by" or "used for agricultural purposes by." Here neither does the judgment-debtor live in the *khurli*, nor does he use it for any purpose whatever. I hold that it is liable to attachment, and I dismiss this petition with costs.

Petition dismissed.

No. 66.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

AGIA SINGH,—(DEFENDANT),—APPELLANT,

Versus

BALLA MAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 724 of 1908.

Execution of decree—Surety under Chief Court Circular Order LVII, Rule II (i)—Liability of such surety—How and when enforceable.

Held, that where a man stands surety under Chief Court Circular Order LVII, Rule II (i) for a petitioner for revision to the Chief Court, the security must be limited to the security demandable under the rules of the Court, no matter in what terms the security bond is worded and must, therefore, necessarily be confined to the performance of the order under revision.

Held, therefore, that no liability could be attached to the surety in this case unless and until the decree-holder had failed to satisfy his decree by the sale of the properties attached under the order under revision.

Further appeal from the order of W. Le Rossignal, Esquire, Divisional Judge, Amritsar Division, dated the 30th May 1908.

Grey and Roshan Lal, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—Briefly stated the facts of this case are as follows :—On the 29th April, 1907, a decree for Rs. 2,217 was passed in favour of Bibari Lal, Buta Shah and Baldeo Das, against Hari Ram, Parma Nand, Wasdeo, Ganga Ram and Sulakhan Mal, the five sons of one Pohlo Mal. The decree-holders transferred this decree to Maharaj Mal and Ram Chand, and this transfer was duly recognized by the Court by its order, dated 15th August 1904. On the 4th May 1907 one Balla Mal applied for execution of the said decree stating that the decree had been transferred to him by Maharaja Mal and Ram Chand

1st March 1909.

on the 1st May 1907, and praying that certain properties belonging to the judgment-debtors might be attached and sold in satisfaction of the said decree.

On the 7th May 1907 the judgment-debtors appeared to show cause why the said application should not be granted, and the main ground upon which their objections were based was, that Balla Mal had no right to execute the decree.

The District Judge held that the validity of the alleged transfer of the decree to Balla Mal seemed to depend upon the validity of the transfer of the decree by the original decree-holders in favour of Maharaja Mal and Ram Chand, and that as the latter transfer had been duly recognised by the Court which passed the decree, it was not open to the Court executing the decree to go into the matter. He therefore disallowed the objections and concluded his order as follows :—" Let execution proceed." From this order the judgment-debtors preferred an appeal to the Divisional Judge, though it is conceded on all hands that no appeal lay from that order. The Divisional Judge rejected the appeal, whereupon the judgment-debtors applied to this Court for revision of the orders of the Courts below.

Under Rule II (i) of this Court's Rules and Orders No. LVII, the Deputy Registrar passed an order requiring the applicants (as they had not already performed the order of which revision was sought in so far as the same purported to affect them) to perform the same, or to give security to the satisfaction of the Deputy Registrar for performance of the same within a reasonable time to be specified in the order. On the 23rd December 1907 the present appellant, Agia Singh, executed a bond as surety in accordance with the said order of the Deputy Registrar. This security was duly accepted and the petition was in due course (after certain proceedings to which we need not here refer) admitted to a hearing and eventually rejected by this Court's order, dated 18th April 1908. By his bond Agia Singh had undoubtedly made himself responsible for the due performance of the original decree and costs, and on the 27th April 1908, Balla Mal applied to the District Judge for execution of the said decree against the surety, Agia Singh, by attachment and sale of his property, or by his arrest and imprisonment. Admittedly no application for execution of the decree was made against the original debtors.

Upon this application the District Judge, by order, dated 30th April 1908, directed Agia Singh to be imprisoned in the Civil

jail for two months, and this order was at once put in force. Agia Singh thereupon appealed to the Divisional Judge, and was released on bail pending his appeal. On the 30th May 1908 the Divisional Judge dismissed this appeal, and Agia Singh was again arrested and imprisoned, but was subsequently released on bail by the orders of this Court. He has preferred a further appeal to this Court from the orders of the lower Courts directing his imprisonment, and we have heard the case argued both on his behalf and on behalf of the decree-holder.

In our opinion the order under appeal cannot possibly stand. We are not here concerned with any right which the decree-holder or any one else may have to enforce Agia Singh's bond of the 23rd December 1907 by regular suit. The sole question before us is whether the order impugned was legally justifiable. Now under the rules of this Court the only security which could be demanded of the judgment-debtors when they applied for revision of the order of the Divisional Judge, dated 26th July 1907, confirming the order of the District Judge, dated 17th June 1907, was for performance of the said order within a reasonable period. These rules must be strictly construed, and obviously the liability of the person who stood surety for the judgment-debtors could not be more extensive than the liability of the latter, no matter in what terms the security bond was worded. Thus, under the rules the judgment-debtors and their surety were bound to perform the order under revision. This was the primary liability, and the secondary liability of the surety would arise only after it had been found impossible or impracticable to enforce the primary liability. We have, therefore, to see what this primary liability was, and for this purpose we must necessarily refer to the order of the District Judge, dated 17th June 1907, because the order of the Divisional Judge on appeal merely confirmed that order.

As we have pointed out Balla Mal applied to the District Judge for attachment and sale of certain properties belonging to the judgment-debtors, and the order of the District Judge thereupon (after overruling the objections of the judgment-debtors) was: "Let execution proceed." This order is by no means as clearly expressed as it might be. Its meaning may be merely that as the applicant has established his *locus standi* as a transferee of the decree, let him now take steps to enforce his decree. But assuming that it was intended to mean that Balla Mal's application was granted, and that the properties specified therein should be attached and sold in execution, the fact still

remains that the order would (in that event) be merely one for the attachment and sale of those properties. Accordingly the security demandable under the rules of this Court must necessarily be confined to the performance of that order within reasonable time, and the first thing that the decree-holder would have to do in the event of the petition for revision being rejected would be to enforce that order, the judgment-debtors and their surety being bound to give him every facility for effecting his object. But instead of attempting to carry out this order for attachment and sale of the judgment-debtor's property (if in truth that order can be so construed) the decree-holder within nine days of this Court's rejection of the petition for revision applied for the attachment and sale *of the surety's property, or in the alternative for his arrest and imprisonment.* This was in itself a most extraordinary proceeding, and we must confess that we are astonished to find that any Court should have entertained it. No attempt whatever was made by the decree-holder to enforce execution against his original judgment-debtors; on the contrary he almost immediately after the passing of this Court's order proceeded against a person, who (save for the proceedings in this Court) would have had no connection whatever in the dispute between him and his debtors. It would be in the highest degree inequitable to use language of moderation, if this attempt were to succeed, and we can only regret that the unfortunate surety has been subjected to the grave indignity to say nothing of inconvenience of being imprisoned upon this entirely unwarrantable application on the part of the decree-holder. Before any steps can be taken against a surety in a case such as this, the decree-holder must show that he has endeavoured without success to enforce performance of the order of which revision was sought, and that the judgment-debtors have had reasonable time within which they might have performed that order. In the case before us the decree-holder has admittedly not attempted to enforce that order, and he has, in a most unjustifiable manner, taken high-handed proceedings in the first instance against the surety almost immediately upon this Court's rejection of the petition for revision. Briefly summarised our view is that the security given by Agia Singh must be limited to the security demandable under the rules of this Court, and that in the present case such security must be taken to have been merely for the performance of the order of the District Judge, dated the 17th June 1907; that at most, this order was for the attachment and sale of the judgment-debtor's properties specified in the decree-holder's application of

the 4th May 1907; and that no liability could attach to the surety unless and until the decree-holder had failed to satisfy his decree by the sale of such properties. Instead of proceeding according to law and equity, the decree-holder has in the most arbitrary manner succeeded in obtaining an order for the imprisonment of the surety, and we have no hesitation in saying that the Courts were most ill-advised in rendering him their help in this direction. We go even further and say that the orders now under appeal were entirely illegal.

This appeal is accordingly accepted with costs throughout, and the orders of the lower Courts are set aside.

In conclusion we would only add that Mr. Grey raised a number of other objections to the validity of the proceedings in the lower Courts, but upon the view that we take, we find it unnecessary to deal with these arguments, of which some at all events appear to have considerable force.

Appeal allowed.

No. 67.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

JAWALA SAHAI, &c.,—(PLAINTIFFS),—APPELLANTS,

Versus

RAM SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 453 of 1908.

Custom—Alienation—Status of alienee of reversionary rights to contest an alienation.

Held, that a reversioner's right to contest an alienation under customary law is not transferable to a stranger and *ergo* that where a reversioner, who has succeeded after the death of a widow, alienates his reversionary rights, the alienee has no *status* to contest the validity of mortgages made by the widow.

Sher Singh v. Sidhu, (1) overruled, *Tota v. Abdulla Khan* (2) followed, *Maula Dad v. Ram Gopal* (3) referred to.

Further appeal from the decree of M. L. Waring, Esquire, Additional Divisional Judge, Shahpur Division, dated 7th January 1908.

Harbhagwan Das, for appellants.

Devi Dial, for respondents.

(1) 11 P. R., 1907.

(2) 66 P. R., 1897, F. R.

(3) 22 P. R., 1900.

The judgment of the Court was delivered by—

8th March 1909.

JOHNSTONE, J.—The facts necessary to be stated for the due understanding of this case are these:— Mussammat Begman, who had been a widow for many years, executed two successive mortgage-deeds of the same land, dated 12th July 1895 and 19th April 1897 respectively, the total mortgage-money being Rs. 800. She then died and her property was mutated in favour of Mahla, reversioner. On 16th January 1899 Mahla sold all his rights to plaintiffs, Jawala Sahai and Bishen Singh, including among those rights, the right to contest the widow's mortgages. Her mortgagees and their representatives are now Ram Singh, Ruldu Ram and Kirpa Ram. Armed with this sale-deed plaintiffs, on 20th February 1904, brought this suit for possession against these three persons and Mahla. The first Court held that the sale to plaintiffs was a genuine transaction, that Mussammat Begman's transactions were not for "necessity", and that plaintiffs having purchased Mahla's rights could maintain the suit and contest the validity of that lady's acts.

The learned Additional Divisional Judge remanded under Section 566, Civil Procedure Code (1882) for further enquiry, and upon receipt of an incomplete return, made another remand. To this the Munsif made a return without recording his own opinions, and the Divisional Court again sent back the case. The Munsif then submitted a lengthy report, the main points in which were that Ram Singh aforesaid had failed to prove (a) the passing of full consideration on the widow's mortgages, and also (b) the "necessity" for the same.

When this was laid before the new Divisional Judge, Mr. Waring, he took up first the question of plaintiffs' *locus standi* and held, following *Moula Dad v. Ram Gopal* ⁽¹⁾, and declining to follow the Single Judge ruling *Sher Sing v. Sidhu* ⁽²⁾ that plaintiffs could not contest the validity of the widow's alienations, and therefore gave plaintiffs a decree for possession on payment of Rs. 800 in full, and allowed defendants' costs throughout.

This view was undoubtedly correct, and it is a pity that so much time and money have been wasted over the case. The remands would all have been avoided if the aforesaid Additional Divisional Judge had taken up the preliminary point first and had decided it as Mr. Waring decided it.

(1) 22 P. R., 1900.

(2) 11 P. R., 1897.

The plaintiffs have preferred this further appeal to this Court, and we have heard ingenious and lengthy arguments from Lala Harbhagwan Das, Pleader, on their behalf. He first of all attempted to distinguish *Maula Dad v. Ram Gopal* ⁽¹⁾ a Division Bench case by pointing out that in it the reversioner had merely mortgaged his rights after the death of the widow, while here he had sold all his rights. It is argued that Mahla had the right to contest the widow's mortgages, and therefore, inasmuch as he sold all his rights to plaintiffs, expressly including the right to contest these mortgages by the widow *Maula Dad v. Ram Gopal* ⁽¹⁾ is no guide in the present case. No doubt this distinction does exist; but even so, we are of opinion that the Bench that decided that case would have concurred in the view we are taking here, which is also in full conformity with *Tota v. Abdulla Khan* ⁽²⁾ in which it was plainly laid down that a reversioner's right to contest an alienation under customary law is not transferable to a stranger. This ruling settles the question, and we thus find that the ruling in *Sher Singh v. Sidhu* ⁽³⁾ cannot be treated as an authority at all, being directly opposed to an earlier ruling by a Full Bench, in which earlier ruling we express respectful concurrence. We have some difficulty in following the line of thought in some passages in the Single Bench ruling; but it is clear to us that where in that ruling the learned Judge expresses an opinion contrary to that stated above as having been laid down in the case of 1897, his opinion cannot be accepted.

Lala Harbhagwan Das has also argued the case on first principles apart from authority; but we are not pressed by the arguments he has put before us by way of shewing the unsoundness of the view taken in the Full Bench case; and the other authorities quoted by him, such as *Malik Ala Bakhsh v. Ghulam* ⁽⁴⁾ and *Achal Ram v. Karim Husain Khan* ⁽⁵⁾ seem to us quite besides the mark. Agreeing with the lower Appellate Court, we dismiss this appeal with costs.

Appeal dismissed.

⁽¹⁾ 22 P. R., 1900.

⁽³⁾ 11 P. R., 1907.

⁽²⁾ 66 P. R., 1897, F. B.

⁽⁴⁾ 13 P. R., 1899.

⁽⁵⁾ I. L. R., XXVII All., 271, P. C.

No. 68.

*Before Sir William Clark, 'Kt., Chief Judge, and Mr.
Justice Reid.*

CHAMPAT RAI,—(DEFENDANT),—APPELLANT,

Versus

DOULAT RAM AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 1393 of 1907.

*Custom—Adoption by widow without husbands' authority—Succession
—Exclusion of daughter by collaterals—Agarwal banias, Ludhiana city.*

Held, that among Agarwal banias of Ludhiana city who are not Jains, an adoption by a widow could not be effected, without the authority of her husband.

Held, also that by a special custom among them, near collaterals exclude the daughter in succession to ancestral property.

*Further appeal from the decree of C. L. Dundas, Esquire,
Divisional Judge, Ambala Division, dated the 8th May 1907.*

Lal Chand and Sheo Narain, for appellant.

Shadi Lal, for respondents.

The judgment of the Court was delivered by.

9th Jany. 1909.

REID, J.—The parties are Agarwal banias of Ludhiana city, and the suit was instituted by the collaterals of Bishambar Das for a declaration that a deed executed by his widow on March 4th, 1902, by which she purported to adopt Champat Rai, son of Mussammat Raj Devi, her daughter, did not affect their reversionary interests. Mussammat Premi died before the appeal below was disposed of.

The first question for consideration is whether the suit was barred by limitation. We concur with the Courts below in holding that there was no adoption, or expression of intention to adopt, before February 1900, and the suit instituted in 1903, was consequently within limitation under Article 118 of the Limitation Act.

We also concur with the Courts below in holding that Bishambar Das did not authorise Mussammat Premi to adopt, and that adoption could not be effected without his authority, the parties not being Jains. The attempt to prove that they are Jains is of the feeblest description and was not seriously supported at the hearing.

The pleas, of non-joinder of a necessary party and that the plaintiffs respondents had no *locus standi* were also not seriously pressed and have no force.

The remaining pleas traverse the concurrent finding that a special custom excluding daughters from inheritance in the presence of near collaterals has been established.

As remarked by the learned Divisional Judge, the parties came into Court apparently without any clear conception of the law or custom to which they were subject and did not know what the Hindu law on the point actually was. The plaintiff-respondents can consequently not be bound down to a vague allegation that they are governed by Hindu law in matters of succession.

The authorities cited for the appellant are—

- (1) *Mussammat Menglam v. Lekhraj* ⁽¹⁾ in which Barkley and Burney, JJ. held, that no uniform custom had been established, among Agarwal banias of Jagadhri, by which brothers and nephews exclude daughters from self-acquired property. Burney, J. added that the cases in which daughters were excluded appeared to have much weight, but that, as the burden of proof was on the plaintiffs who had not proved that the custom set up was general, the suit must be dismissed.
- (2) *Sham Ram v. Mussammat Hemi Bai* ⁽²⁾, in which it was held, that no custom among Dal Khatri, Muzaffargarh, of collaterals excluding daughters from father's self-acquisition in village, which was not the village of his origin or the residence of the collaterals, had been established.
- (3) *Wishan Das v. Thakur Das* ⁽³⁾, in which Hindu law was followed, the plaintiffs, Mahotra Khatri of Multan, having failed to establish a special custom.
- (4) *Mussammat Jamna Devi v. Ohuni Lal* ⁽⁴⁾ in which the same was held, the parties being Twari Brahmans of Amritsar.
- (5) *Moula Bakhsh v. Muhammad Bakhsh* ⁽⁵⁾ in which it was held, that Muhammadan Kashmiris of Lahore were governed by Muhammadan law.

⁽¹⁾ 110 P. R., 1884.

⁽³⁾ 119 P. R., 1901.

⁽²⁾ 73 P. R., 1896.

⁽⁴⁾ 30 P. R., 1903.

⁽⁵⁾ 54 P. R., 1906.

- (6) *Radho v. Harnoman* ⁽¹⁾, in which the defendants failed to prove that Aroras of Amritsar city were governed by a custom entitling collaterals to exclude daughters.
- (7) *Bura Mal v. Narain Das* ⁽²⁾, in which the parties were Bunjahi Khatris of Rawalpindi city, and it was held that a custom excluding daughters in favour of collaterals had not been established.
- (8) *Bhagwan Singh v. Bhagwan Singh* ⁽³⁾, in which it was held that evidence need not be adduced of actual events to show that, in point of fact, people subject to the general law regulate their lives by it, but that special customs may be pleaded by way of exception, and that it is proper to prove these by evidence of what is actually done.
- (9) *Wasna Ram v. Mussammat Uttam Bai* ⁽⁴⁾, which is of no value to the appellants, the finding, that Bhatias of Bannu allow a sister to succeed for life or till marriage, being expressly based on the fact that the parties came from Gujrat in the Bombay Presidency, governed by the Maharastra School of Hindu law no custom modifying that law on the point had been established.

The authorities cited for the respondents are—

- (10) *Devi Sahai v. Mangal Sein* ⁽⁵⁾, in which it was held, the parties being banias of the Ambala district, that a special custom entitling sons of separated brother to share with surviving brother self-acquired estate of cousin with whom he had re-associated.
- (11) *Adjudhia Parshad v. Dwarka Das* ⁽⁶⁾, in which it was held that among Mahajans of Karnal, a custom allowing representation among collaterals existed.
- (12) *Kanhya Lal v. Kishna* ⁽⁷⁾, in which the same was held of Agarwal banias of the Gurgaon district.
- (13) *Mussammat Nihal Devi v. Behari Lal* ⁽⁸⁾, in which it was held that among Basal banias of Jullundur

⁽¹⁾ 99 P. R., 1907.

⁽²⁾ 102 P. R., 1907.

⁽³⁾ I. L. R., XXI All., (P. C.), 412.

⁽⁴⁾ 79 P. R., 1903.

⁽⁵⁾ 81 P. R., 1874, (F. B.).

⁽⁶⁾ 71 P. R., 1882.

⁽⁷⁾ 39 P. R., 1884.

⁽⁸⁾ 103 P. R., 1891.

city, a childless widow was not entitled to movable and immovable property acquired by her husband jointly with his joint brothers.

- (14) *Narsingh Dass v. Ram Lal* ⁽¹⁾, in which it was held, that, among Agarwal banias of Bhiwani, Hissar, a widow could not make a gift of her husband's property and daughters were not entitled in the presence of collaterals.
- (15) Remarks by Chatterji, J. on pages 150—152 of *Maharaj Narain v. Banoji* ⁽²⁾, which are very much in point in the present case to the effect that instances cited by witnesses, who have not been cross-examined, must not be rejected merely because those witnesses have not deposed to details as to which they could have been, and were not cross-examined, and to the effect that witnesses should not be expected to prove that the custom deposed to is ancient, the test being the uniformity of practice.

The authorities cited are in favour of the probability of the existence of the custom found by the Courts below to exist, and it is significant that the family migrated to the Ludhiana district, about one hundred years ago, from Maham, about 10 miles from Bhiwani, the home of the parties in *Narsingh Dass v. Ram Lal* ⁽³⁾.

Many instances were cited for the respondents and three for the appellants, who examined about 30 witnesses. Even if, of the respondents' instances, those concerned with Saraogi Jains only be set on one side, many instances directly in point remain. It is true that Debi Sahai, who deposed to the first, second and fourth instances, retained a pleader for the respondents, but the appellants failed to shake him in cross-examination or to rebut his evidence. Counsel for the appellants criticised each instance in detail, and contended that Nos. 6, 16, 19 and 20 alone were in point, and that the three last specified were of no value, the property involved in them being so small, as not to be worth fighting for. It was further contended that in No. 2 the daughter had no male issue, only a daughter and a daughter's son, and that her husband was so rich that she did not care to claim; that in No. 4, Shib Dial, alleged to have succeeded to his collateral in preference to a daughter,

⁽¹⁾ 55 P. R., 1895.

⁽²⁾ 34 P. R., 1907.

⁽³⁾ 55 P. R., 1895.

was not produced; that No. 6 was deposed to by one witness only, who had no direct concern in the instance, that Nos. 3, 5, 8, 15, 16 were concerned with Sarangi Jains only; that in No. 17 the daughter died before the widow, that No. 19 is inconclusive; that No. 20 was very recent; that in No. 4 there was an absolute absence of details as to nature of family; that No. 10 was deposed to by one witness only and was recent; that Marli Dhar, who deposed to No. 14, is a Saraogi; and that the burden of proof had erroneously been placed on the appellant. Most of these criticisms are superficial and are disposed of by my brother Chatterji's remarks above cited, and we see no reason for holding that the instances cited did not exist or can be explained away as suggested for the appellants.

There is no question here of erroneous imposition of burden of proof. The Courts below have given the respondents a decree on the evidence adduced by them, not merely because the appellants failed to establish the non-existence of the custom set up.

The fact that Mussammat Premi stated in revenue-proceedings that the respondents were the heirs is of importance on the issue as to the adoption, but is of little, if any, importance on the issue as to the custom. As already stated, the parties had very vague ideas in the first instance as to the rules governing succession in the family, and Mussammat Premi might well have been in doubt. Any statement by her must necessarily have been inconclusive. Excluding this admission, the record contains evidence amply establishing the custom set up by the plaintiff-respondents. A half-hearted attempt to contend that the property in suit, or at any rate part thereof, was self-acquired and consequently excluded from the effect of the said custom, was made at the hearing, but the point was not taken in the memorandum of appeal below and was not put in issue when the issues were re-framed. We see no reason for allowing the point to be taken now or indeed for holding that any part of the property in suit was self-acquired in the sense of not being acquired from ancestral funds.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 69.

Before Mr. Justice Reid, Chief Judge.

ARURA MAL,—(DEFENDANT),—APPELLANT,

*Versus*KESAR SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Miscellaneous Appeal No. 973 of 1907.

*Limitation—Declaratory suit, contesting alienation—Punjab Limitation Act, I of 1900, Article 1—Indian Limitation Act, XV of 1877—Article 120 and Section 28.**Held*, that the provisions of Section 28, Indian Limitation Act of 1877 being expressly limited to suits for possession do not apply to suits for declarations, and that a person in possession has no vested right to the benefit of any specific period of limitation, not in force when the suit was instituted.*Held*, therefore, that a suit instituted in January 1907 for a declaration that a sale-deed executed in January 1897 did not affect the reversionary rights of the plaintiffs was within limitation being governed by Article 1 of the Schedule to the Punjab Limitation Act of 1900 and not by Article 120, Schedule II of the Indian Limitation Act of 1877.*Miscellaneous appeal from the order of H. P. Tollinton, Esquire, Divisional Judge, Lahore Division, dated the 22nd July 1907.*

Oertel, for appellant.

Shelverton, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—The lower Appellate Court held that a suit instituted in January 1907, for a declaration that a sale-deed executed in January 1897 did not affect the reversionary rights of the plaintiffs-respondents, was within limitation, being governed by Article 1 of the Schedule to the Punjab Limitation Act of 1900. 19th Dec. 1908.

Counsel for the appellant contended that the suit was barred by Article 120 of the Limitation Act of 1877, having been instituted more than six years from the date of the cause of action, and cited *Sahib Dad v. Rahmat* ⁽¹⁾ and Section 28 of the Act of 1877. In the case cited the Full Bench held that the Punjab Act did not contain any express provision extending it to

⁽¹⁾ 90 P. R., 1904, (F. B.).

rights to sue vested before it came into force, and depriving of such rights the persons in whom they were so vested.

Counsel contended that the effect of Section 28 of the Limitation Act of 1877, read with this ruling was that the purchaser had a vested right not to be sued after the expiry of six years.

The purchaser had, however, not acquired any prescriptive title by efflux of time before the Punjab Act came into force, and no authority for extending to suits for declarations the provisions of Section 28, expressly limited to suits for possession by the words "the determination of the period limited to any person for instituting a suit for possession of any property," has been cited.

Moreover, the curtailment of a remedy differs widely from the extension of a remedy and Chatterji, J., remarked in *Ram Ditta v. Tehlu* ⁽¹⁾ a change in the law "of limitation, whereby the time for bringing a certain class of suit is curtailed is not a mere change in the form of the remedy but affects the primary right on which the suit is founded. It does not substitute a new remedy but destroys the old one, and thereby destroys or impairs the right itself." A person entitled to property, in the present or the future, has a right to assert his title by suit, and no authority for holding that the person in possession has a vested right to the application of any specific period of limitation, not in force when the suit was instituted, has been cited.

As remarked by Rivaz, J., in his work on limitation, a suit is ordinarily governed by the law of limitation in force when it is filed, and the exceptions to this rule laid down by the authorities are limited to preserving rights vested in the plaintiff, if those rights allow him a period longer than that prescribed by the modification of the law. He is therefore entitled to sue within the period more beneficial to himself.

The appeal fails and is dismissed with costs.

Appeal dismissed.

⁽¹⁾ 4 P. R., 1902.

No. 70.

Before Mr. Justice Reid, Chief Judge.

RUSTAM ALI,—(DEFENDANT),—APPELLANT,

Versus

RODA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 774 of 1908.

*Custom—Pre-emption—Jullundur city—"Katra Jua Khana"—Sub-division.**Held* that the so-called "Katra Jua Khana" is not a separate sub-division of Jullundur city for purposes of pre-emption.*Held*, also, that in the old city of Jullundur pre-emption is general.*Further appeal from the decree of Major B. O. Roe, Divisional Judge, Jullundur Division, dated the 31st August 1907.*

Shahab-ud-din, for appellant.

Shiv Narain, for respondents.

The judgment of the learned Chief Judge was as follows :—

REID, J.—I see no reason for holding that the so-called Katra Jua Khana is a sub-division of Jullundur city, separate from other sub-divisions for purposes of pre-emption. The area is very small and the place was apparently at one time a *serai* with no passage through it. I concur in the opinion, expressed by Anderson, J., in Civil Appeal No. 472 of 1904, that in the old city of Jullundur pre-emption is general, and the building in suit is situate within the walls of the old city. I concur in the findings of the Lower Appellate Court, not a single authority for holding that the right of pre-emption does not extend to the whole of the old city and many authorities establishing the existence of the right in that area, having been cited. In Civil Appeal No. 472 of 1904 a special custom of pre-emption was set up and held not to have been established.

11th Feby. 1909.

The respondent Natha was not served with notice of this day, but the pleader for the appellant elected to proceed without service of notice.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 71.

Before Mr. Justice Rattigan and Mr. Justice M. Shah Din.

JAGAN NATH,—(DEFENDANT),—APPELLANT,

Versus

APPELLATE SIDE.

THE HEAP AND Co., LIMITED,—(PLAINTIFFS), } RESPON-
AND RAJ NARAIN,—(DEFENDANT), } DENTS.

Civil Appeal No. 102 of 1908

Bill of exchange—Drawee—Negotiable Instruments Act, XXVI of 1881, sections 5, 7, 33, and 88—Estoppel by conduct—Contract Act, IX of 1872, section 231—Rights of undisclosed principal.

Where A drew four drafts on B, and B, without the knowledge or authority of A, substituted C as the drawee in his place, and C after that accepted the four drafts—

Held that notwithstanding the provisions of section 88 of the Negotiable Instruments Act, 1881, A, the drawer, is not entitled to hold C, the so-called acceptor, liable on the bills—C not being the drawee cannot bind himself under section 33 of the Act by his acceptance.

Held, also, that the fact that C retired one of the four drafts and obtained possession of the four cases of merchandise covered by that draft, did not estop him from denying his liability on the other drafts, he having almost immediately repudiated his act and at once declined to retire the other drafts, and no third person having been adversely affected by his conduct.

Held, also, that under section 231 of the Indian Contract Act, 1872, A, as an undisclosed principal, could take advantage of any contract made by B, his agent, with C subject to any rights which C might have as against B and that allegations of fraud and misrepresentation by B to C should be inquired into.

Held, further, that assuming that there was a valid contract, A could sue for the whole amount which C agreed to pay and was not bound to sell the undelivered merchandise and sue only for the balance, if any, due to him upon the contract.

Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge, Delhi Division, dated the 13th November 1907.

Grey, for appellant.

Shadi Lal, for respondents Heap and Co.

The judgment of the Court was delivered by

13th Feby. 1909.

RATTIGAN, J.—This is a further appeal by one Jagan Nath, defendant No. 2 in the case, from the decree of the Divisional Judge of Delhi affirming (though on different grounds) the decree passed against the appellant by the District Judge. The facts, pleadings and issues are set forth in detail in the judgments of the Courts below, and we need not, there-

fore, repeat them. Briefly summarised, the facts are that the plaintiff-Company, a piece-goods firm of Manchester, had in August 1906 some 17 cases of flannelette lying in the godowns of the National Bank of India for sale, that defendant No. 1, one Raj Narain, trading as the National Trading Company, Delhi, came to know of this and entered into correspondence with the plaintiff-firm with a view to disposing of these cases, and that his offer was eventually accepted when he sent to the plaintiff-Company the indent of which P. 4 is alleged to be a copy. The original indent is Exhibit D. 1, and was admittedly given by defendant No. 2 to defendant No. 1.

From the correspondence on the file between the plaintiff-Company and defendant No. 1, it is clear that the latter intended to act merely as the agent of the Company in this transaction, and also that the Company recognised this fact and dealt with him as such. But the Company, when accepting the terms of the indent (Exhibit P. 4) which must obviously have shown them that the real buyer was one Jagan Nath, and not defendant No. 1, drew four drafts (of which three are on the file (Exhibits P. 19, P. 20 and P. 21) on defendant No. 1. These drafts were apparently sent to the National Bank of India, though the invoices for the goods were forwarded direct to defendant No. 1. It is admitted that defendant No. 1 thereupon so far altered the drafts as to write above his own business-name, the name of Jagan Nath, care of himself. In other words, he substituted as the *drawee* Jagan Nath in the place of his own firm. After this alteration had been made, Jagan Nath admittedly accepted all four drafts by endorsing his acceptance thereupon. He thereafter retired one of these drafts (for £70) and obtained possession of the four cases covered by that draft. According to his contention, he found that the goods contained in these cases were not of the kind that he had been led by defendant No. 1 to expect, and he accordingly refused to retire the remaining drafts.

Plaintiffs have now sued both defendant No. 1 and defendant No. 2 for the amount due on those three drafts and have also prayed for interest thereon up to the date of realization.

The District Judge held that defendant No. 1 acted in this transaction merely as the agent of the plaintiffs, but that plaintiffs were justified in drawing on him and in holding him responsible, as a drawee in case of need, for payments of the drafts. He, therefore, granted them a decree for the amount

claimed, with costs against him. Defendant No. 1 accepted this decree, and we are not now concerned with him. The learned Judge also held defendant No. 2 liable to the same extent on the ground that he had accepted the drafts, and that unless and until the said drafts were retired by him, he was precluded by the rules of the Mercantile Association of Delhi, with respect to which the contract as embodied in the indent signed by him (defendant No. 1) and its annexure, and the drafts had been drawn up, from pleading any defence to the suit as laid.

Defendant No. 2 appealed to the Divisional Judge, who, while affirming the decree of the District Judge, held that defendant No. 2 was not liable as an acceptor of the drafts, inasmuch as he was neither the drawee, nor the drawee in case of need, nor an acceptor for honour.

In this connection the learned Judge relied upon the well known case *Davis v. Clarke* (1). But defendant No. 2 was held liable on another ground which may best be stated in the learned Judge's own words: "I think, however, his accepting the drafts, though it does not make him liable on the drafts, does show that he contracted to take up the rest of the goods from the plaintiffs, for by then, he must have known who was supplying the goods." The learned Judge further holds that in any case such knowledge on the part of defendant No. 2 is not very material, inasmuch as he made the contract with defendant No. 1 as the agent of plaintiffs, who were undisclosed principals, and who were, therefore, entitled to enforce that contract, subject of course to the rights and obligations existing between defendant No. 1 and defendant No. 2 (section 231, Contract Act). Defendant No. 2 had made allegations of fraud against defendant No. 1, but the learned Judge refused to consider them on the ground that they were advanced for the first time, in that form, in his Court. The particular allegation referred to is that defendant No. 2 had been led to believe that the goods were coming out fresh from England, whereas they had in point of fact been lying for some considerable time in the godowns of the Bank. Before passing on, we may at once point out that the learned Judge was in error in thinking that defendant No. 2 had not made this allegation in the Court of first instance. On the contrary, defendant No. 2, when

(1) 66 Revised Reports 255.

examined on the 4th July 1907, had, in very clear and definite terms, stated that defendant No. 1 had led him to believe that the goods were ready on the looms in England, and did not tell him that they were, in point of fact, actually in Delhi; and that it was not until he opened the four cases, for which he had paid, that he discovered that the contents were not fresh from England. Defendant No. 2 further added that he thereupon asked the Bank to refund what he had paid as he had been imposed upon. This allegation of fraud may be true or false, but it is incorrect to say that it was not made in the Court of the District Judge, and obviously if it can be established, it would afford a good defence to defendant No. 2, not only as against defendant No. 1, but also against plaintiffs, who (upon the view taken by the Divisional Judge) can stand in no better position than their agent, defendant No. 1.

As regards the other grounds upon which defendant No. 2 contested his liability upon the contract (as distinct from his alleged liability on the drafts) the Divisional Judge agreed with the findings of the District Judge, and as a result, he dismissed the appeal with costs.

Defendant No. 2 has appealed to this Court, and plaintiffs have filed cross-objections with regard to their claim for interest up to date of realization. The main points which we have before us for decision are: (1) whether defendant No. 2 is, by reason of his acceptance, liable upon the three drafts, and if not so liable, (2) whether he is liable to plaintiffs upon the contract to buy the 17 cases of flannelette. In the latter event Mr. Shadi Lal admitted that plaintiffs can sue defendant No. 2 only in their capacity as undisclosed principals, and that any defence which the latter would have had as against defendant No. 1, with whom he contracted, would be open to him as against plaintiffs also.

To take these two questions *seriatim*.

The case relied upon by the Divisional Judge, *Davis v. Clarke* (1), is admittedly not in point, and Mr. Grey stated that he did not rely upon it. Mr. Shadi Lal refers to section 88 of the Indian Negotiable Instruments Act, 1881, and contends that, inasmuch as defendant No. 2 accepted the drafts after his own name had been inserted as drawee (by defendant No. 1, the original drawee) the alteration cannot affect the validity of the bill. He further points out that defendant No. 2

(1) 68 Revised Reports, 255.

actually retired one of the four drafts that had been so altered, and is, therefore, estopped from denying that he is bound thereon. To this Mr. Grey replies that section 88 of the Act is subject, in all cases, to section 33, and that under the terms of that section only a drawee (or an acceptor for honour) can be made liable on a bill, and that in no case can any one, except the actual drawer, "make" a drawee. In the present case the drawer of the bill was admittedly the plaintiff-firm, and in paragraph 3 of their plaint they distinctly assert that they drew the bill on defendant No. 1. Was it, then, competent to defendant No. 1 to substitute defendant No. 2 (without the knowledge or consent of the drawer) as the drawee, and if he did so, did he thereby render defendant No. 2 liable (after acceptance) to the original drawers? In our opinion there can be but one answer to this question, and that in the negative. Section 5 of the Indian Negotiable Instruments Act, 1881, defines a bill of exchange as an instrument in writing containing an unconditional order, signed by the maker, directing "a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument," and it further provides that "the person to whom it is clear that the direction is given or that payment is to be made may be a 'certain person' within the meaning of this section and section 4, although he is misnamed or designated by description only." Section 7 of the Act declares that "the maker of a bill of exchange or cheque is called the 'drawer'; the person thereby directed to pay is called the 'drawee'". Provision is also made to the effect that "when in the bill or in any endorsement thereon the name of any person is given in addition to the drawer to be resorted to in case of need, such person is called a drawee in case of need."

In the present case what happened was, that the drawee, without the knowledge or authority of the maker of the bill, substituted a third person as the drawee, and this third person purported to "accept" the bill. We do not think that in these circumstances the drawer is entitled to hold the so-called "acceptor" liable on the bill. He is not the "drawee" and under section 33 of the Act he cannot bind himself by his acceptance. We are unable to find any case directly in point, probably for the simple reason that mercantile people have never contemplated the possibility of a drawee acting in the way that the drawee has done in this case.

In *Steele v. McKinlay* ⁽¹⁾ (at pages 782, 783) Lord Watson observed: "To hold that a stranger to a bill who writes his name across the back of it before it has passed out of the hands of the drawer, thereby becomes liable to the drawer, failing payment by the drawees, appears to me to be as inconsistent with the principles of the law merchant as to hold that there may be a drawer other than the original drawer and payee, or that there may be an acceptor other than the drawee or one who accepts as his agent or for his honour. It may be convenient in some cases to describe the liability of a person whose name is on a bill and who is neither payee nor drawee as being the liability of a drawee or acceptor, but in these cases liability cannot arise from such person being either a drawee or an acceptor in the sense of the law merchant, but from some agreement, extrinsic of the bill itself." In *Jackson v. Hudson* ⁽²⁾ Lord Ellinborough remarked: "I know of ————— no custom or usage of merchants according to which if a bill be drawn upon one man, it may be accepted by two," and in the case of *Divis v. Clarke* ⁽³⁾ (above cited) Lord Denman, C. J., stated that "there is no authority either in the English law or the general law of merchants for holding a party to be liable as an acceptor upon a bill addressed to another."

Again in *Herald v. Connah* ⁽⁴⁾ Lord Campbell said: "If a bill be drawn on me, I must accept it so as to make myself personally liable or not at all, for no one but the drawee can accept." In the more recent case *In re Barnard* ⁽⁵⁾ a bill of exchange was drawn on a firm, and was accepted by one of the firm, who wrote the name of the firm and added his own. It was held that on the bankruptcy of the firm the holder of the bill was a joint creditor only, and that he could not enforce any claim as a separate creditor of the member of the firm who had signed it.

The rule to be deduced from these authorities and from the provisions of section 7 of the Indian Act (and also from section 6 of the English Bills of Exchange Act, 1882) is that the drawee of the bill is the person designated in the bill as such by the drawer, and that he must be named or otherwise indicated in the bill with reasonable certainty. The drawee (if he is not a fictitious person) can either accept or decline to accept the bill; but he cannot of his own motion substitute another person in

⁽¹⁾ L. R. App. Cases, 754.

⁽²⁾ Campb. 447 and 11 Revised Reports, 762.

⁽³⁾ 66 Revised Reports, 255.

⁽⁴⁾ 34 L. J., 885.

⁽⁵⁾ L. R., 32 Ch. Div., 447.

his place as drawee. We are not here dealing with cases where the negotiable instrument is delivered to a holder either wholly blank or incomplete (section 20 of the Indian Negotiable Instruments Act) nor with the case where the drawee is a fictitious person (section 5 (2) of the Bills of Exchange Act), and all that we decide in this case is that it is not open to a drawee, named as such in the bill, to substitute a third person in his place, and that consequently the acceptance of a bill by a third person who has been so substituted does not in law bind the latter. Nor do we think that in the circumstances of the case defendant No. 2 is in any wise estopped from denying his liability. He, no doubt, retired one of the drafts which he accepted, but his act in so doing in no way prejudiced either the drawer or the original drawee so far as the other drafts were concerned. He almost immediately repudiated his act and at once declined to retire the other drafts, and it is not contended that third persons were adversely affected by his conduct.

So far then as the drafts are concerned, we agree with the Divisional Judge, though for rather different reasons, that defendant No. 2 cannot be held liable upon his acceptances.

The next question is, whether he is liable to plaintiffs upon some agreement extrinsic of those drafts.

It is not denied that defendant No. 2 entered into a contract with defendant No. 1 with regard to the purchase of the flannelette. On the contrary, this is an admitted fact. Defendant No. 2, however, contends that he was dealing with defendant No. 1 as a principal, and that he had no reason to suppose that the latter was merely the agent of plaintiffs. This may have been so but both the Courts below are agreed that in this matter defendant No. 1 was acting as the agent of plaintiffs, though he was not known to defendant No. 2 to be such. We see no reason to differ from this finding, which is borne out by the correspondence on the file, from which it is obvious that both defendant No. 1 and the plaintiffs were doing business *inter se* on the footing of agent and principal. In the circumstances section 231 of the Indian Contract Act would be applicable, and would enable the plaintiffs as the undisclosed principals, to take advantage of the contract made by their agent, defendant No. 1, subject of course, to any rights which defendant No. 2 might have as against defendant No. 1. Mr. Grey argues that in view of their plaint and pleadings, plaintiffs cannot be allowed to assert that defendant No. 1 was merely their agent in this transaction. It may be conceded that the plaint is not expressed

very happily, and that Mr. Raj Narain, plaintiffs' counsel, made a statement on May 1907, which would seem to suggest that plaintiffs regarded defendant No. 1 as principal and not as agent. But it must be remembered that plaintiffs were themselves in England, and that it was not altogether an easy matter for their counsel in India to accurately state the actual facts. Having regard, however, to the correspondence on the file, we agree with the Lower Courts that the only possible construction to place upon the letters which passed between the parties is that plaintiffs treated defendant No. 1 as an agent for the disposal of the goods in question, and we find it difficult to believe (in the face of the terms of D. 1 written in *Hindi* by defendant No. 2 himself) that he did not know that he was dealing with some unknown principal through an agent. If he was dealing with defendant No. 1, a resident of Delhi, as the principal in the transaction, why was it necessary to state that the acceptance of his offer must be made within 25 days, and that the value of the flannelette should be taken to be 1½ penny a yard. Taking everything into consideration, we agree with the concurrent finding of the Courts below that defendant No. 1 was acting in this matter as the agent of the plaintiffs and that defendant No. 2 had every reason to suspect, even if he did not actually know, that such was the case. As we have already remarked, the plaint is not in this respect very happily worded, but having regard to paragraph 8 thereof, and to the explanation of that paragraph given by Mr. Raj Narain on the 17th June 1907, we agree with Mr. Shadi Lal that what was meant was, that defendant No. 1 was really the agent of plaintiffs, but that, if the Court found that he had exceeded his authority and had dealt with the goods as his own, then, and in that event, he should be treated as the principal and liable as such to plaintiffs. The learned Divisional Judge has, in our opinion, quite rightly treated defendant No. 1 as the agent of plaintiffs in this matter, but he is not, we think, justified in saying that plaintiffs maintain that he (defendant No. 1) was a principal, acting direct with themselves. Defendant No. 2 had, in reply to the claim, set up certain conditions which, he alleged, had been agreed to between defendant No. 1 and himself, and it was with reference to these alleged conditions that plaintiffs maintained that defendant No. 1, if he had really agreed to such conditions, must be regarded as having acted on his own behalf and not as their agent.

This was clearly all that they meant, and it would have been impossible for them to contend that, apart from any such conduct on his part, defendant No. 1 was other than a mere agent of theirs. That the parties were not misled as to this

point is clear from the wording of issue No. 1, which was fixed on the 17th June 1907, after Mr. Raj Narain had explained the true position of the plaintiffs, and after the counsel for the defendants Nos. 1 and 2 had replied to Mr. Raj Narain. This issue runs as follows :—"Whether there was a contract of sale between plaintiffs and defendant No. 2, or was defendant No. 2 dealing with defendant No. 1 as principal." This issue makes it perfectly clear that the parties were well aware that plaintiffs' contention was, that the contract had been made between them and defendant No. 2 through the agency of defendant No. 1, and it was upon this issue that the Lower Courts found that plaintiffs' contention was correct. With this finding we entirely agree, and the result is that plaintiffs can take advantage of this contract and sue defendant No. 2 upon it.

But from the statement made by defendant No. 2, on the 4th July 1907, it is clear that he makes certain allegations of fraud and misrepresentation on the part of defendant No. 1. He states that defendant No. 1 informed him that each box would contain 5 pieces of 12 assorted designs according to a pattern-book shown to him by the latter, and that the goods were on the looms in England. He adds that he would not have purchased the goods had he known that they had for some time past been lying in the godowns of the National Bank of India at Delhi. The learned Divisional Judge has apparently overlooked this statement, and has refused to consider the question of fraud or misrepresentation on the ground that it was not raised in the first Court in this form. This is obviously wrong, and we think that before defendant No. 2 can be held liable, on the contract made between him and defendant No. 1 (acting as agent for the plaintiffs), he should be given an opportunity of proving the truth of his allegations.

We, therefore, remand the case to the Court of the District Judge, for further enquiry upon the following issue :—

Was the contract entered into between defendant No. 2 and defendant No. 1 induced by any fraud or misrepresentation on the part of defendant No. 1 ?

The nature of such fraud or misrepresentation is set forth in the statement of defendant No. 2 above referred to, and the issue must be strictly confined to the matters therein alleged as constituting fraud or misrepresentation, and the burden of proof will, of course, rest upon defendant No. 2. A return to this order should, if possible, be made by the District Judge within

four months and through the Divisional Judge, who will kindly favour this Court with his opinion.

Before concluding, we may dispose of two points upon which some argument was addressed to us, though neither point was seriously pressed. It was urged in the first place on behalf of the defendant-appellant that the plaintiffs were not entitled to sue for the price of the goods as a whole, as they had not sold such part of the same as remained in their hands, the contention being that they were bound to sell the latter and were entitled to sue merely for the balance due to them upon the contract. We confess we are unable to appreciate the force of the argument. Plaintiffs' position is that defendant No. 2 has contracted to purchase the whole of their goods and that he has in fact not done so. They, therefore, claim the amount which (according to them) the said defendant agreed to pay, and in this connection it seems to us absolutely immaterial that plaintiffs have not sold the goods of which that defendant has refused to take delivery. From their point of view, the goods belong to defendant No. 2, and it is for him to do what he likes with them. So far as they are concerned, they claim to be paid for the whole of the goods which, upon their contention, now belong to defendant No. 2 and not to themselves, and in our opinion, assuming that there was a valid contract between defendant No. 2 and themselves with regard to the purchase of these goods, their contention is perfectly sound. We agree, therefore, with the Lower Courts that the mere fact that plaintiffs have not sold the remainder of their goods is not, and cannot be, any bar to their present claim.

The second point relates to the rules and regulations of the Hindu Mercantile Association of Delhi. Plaintiffs contend that according to these rules defendant No. 2 cannot claim a survey of the goods before he has paid for them, and that he cannot claim a survey in this case because he has not retired the drafts. This argument would have had some weight had defendant No. 2 been liable on the drafts, but as we find that he is not so liable, it is absurd to hold that he cannot raise any defence to this claim, because he has not retired those drafts. All arguments based on the said rules and regulations pre-suppose that the drafts are binding upon defendant No. 2, and they must necessarily fall to the ground once it is held that defendant No. 2 was under no legal obligation to retire those drafts.

Thus the sole question upon defendant's appeal now remaining for determination is whether defendant No. 2 is bound by

the contract entered into by him with defendant No. 1 as the agent of the plaintiffs, and the answer to this question will depend upon the return to be made to the issue which we have remanded to the District Judge for enquiry.

Plaintiffs' cross-objections with regard to interest will be disposed of when the case comes up for final determination.

Case remanded.

No. 72.

Before Mr. Justice Rattigan and Mr. Justice M. Shah Din.

RICHARD WATSON AND G. H. GIBBONS,—
(PLAINTIFFS),—APPELLANTS,

Versus

THE MUNICIPAL CORPORATION OF SIMLA,—
(DEFENDANT),—RESPONDENT.

Civil Appeal No. 587 of 1908.

APPELLATE SIDE.

Limitation—Suit for compensation against Municipal Corporation—Indian Limitation Act, 1877, Section 24, Articles 2 and 33—Starting point of limitation.

Held that the provisions of article 2 of the Indian Limitation Act, 1877, is not merely applicable to those cases in which the defendant at the time of doing the act informs the other party in so many words that he is acting under such and such a provision of law; it is sufficient for him to show that in doing the act he was at the time under the honest belief that his act was authorised by Statute.

Held, also, that the omission by a Municipal Corporation to give the other party the Statutory notice prescribed by section 120 C of the Municipal Act does not take the case out of the operation of article 2.

Held, also, that if damage is caused to a person by an act alleged to be in pursuance of an enactment, article 2 of the Limitation Act is applicable notwithstanding that damage resulted to plaintiffs' property not immediately but after the lapse of some time, though it does postpone the accrual of the cause of action under section 24 until such time as the damage occurred and limitation will run against him only from the date of such accrual.

Held, therefore, that when a plaintiff seeks compensation for damages in respect not of the original act done by a public body who purport to have acted in pursuance of Statutory powers but of the consequences of such act which have resulted in injury to himself, he must under article 2 of the Indian Limitation Act, 1877, sue within 90 days from the date when such injury occurred.

First appeal from the decree of W. De. M. Malan, Esquire, District Judge, Simla, dated the 23rd March 1908.

Shadi Lal and Petman, for appellants.

Saunders, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—The plaintiffs in this case are the executors under the will of the late Mr. Thomas Bliss, and the Municipal Committee of Simla is the defendant. The claim is for the sum of Rs. 14,491-15-5, with costs and interest at such rate as the Court may deem reasonable, and the grounds upon which this claim are based are set forth very clearly in the plaint which runs as follows :—

1. " That the late Thomas Bliss, who died at Hammer-smith, Middlesex, England, on the 23rd day of February 1907, was the sole proprietor of the estate in Simla known as Combermere House, and that the above-named plaintiffs are executors appointed by his will, of which probate was granted to them by the District Judge of Simla on the 15th day of November 1907.

2. " That by a notice, dated 26th October 1901, under section 120 (c), of Act XX of 1891, the defendant intimated to the plaintiffs his intention to commence operations connected with the laying of pipes through the plaintiff's estate, in reply to which the plaintiff, on the 13th November 1901, through his legal adviser, gave the defendant due notice that the ground belonging to the said estate had no strength or cohesion, was friable and crumbly, and that any interference with the soil might endanger the house, and that the laying of pipes should not be undertaken, and if the defendant proceeded with the work, the plaintiff would hold him liable for all or any damage accruing therefrom. To which the defendant replied by his letter No. 3954 of the 11th December 1901, forwarding copy of a letter No. 188 of the 7th idem, from the Executive Engineer, Simla Extension Works Division, admitting that Combermere House was a very unsafe ground, that damage had accrued to the estate the previous winter in carrying out repairs, that the position originally chosen on the nalla side of the shop would be objectionable for laying the pipes and dangerous to the safety of the shop if any hill-side cutting were undertaken, and in consequence of these objections another line was chosen on the other side.

3. "That the defendant by his letter No. 5799 of the 6th December 1904 again intimated to the plaintiffs that it was decided to introduce 'a sullage water drainage system' from the precincts of the United Service Club through plaintiff's estate to the Cart Road and the Hotel Metropole, and that any damage to the hillside affecting plaintiff's property would be made good by means of revetments, and this undertaking was repeated in paragraph 10 of the defendant's letter, No. 6004, of the 19th idem. But plaintiff was not satisfied with this undertaking and demanded from the defendant a guarantee that any damage to the property itself would be made good, which, however, the defendant did not give, and plaintiff then duly served the defendant with notice, dated 31st idem, that defendant would be held liable for all and any damage caused by the said work.

4. "That in consequence of defendant's gross and culpable negligence in carrying out the work, the hillside above the new cutting for pipes made by the defendant, the defendant having reverted to the 'original position' objected to in the letter No. 188 of the 7th December 1901, from the Executive Engineer, Simla Extension Works Division, came down, which was duly intimated to the defendant by the plaintiff in his letter of the 1st March 1905, to which the defendant replied by his letter No. 1331 of the 23rd idem that the slip was in no way connected with the drainage arrangements recently carried out by him, but at the same time admitting that the hillside at the place referred to had been in a very unstable state for a long time past.

5. "That in the months of July and August 1906, as the result of the cutting of the hillside by the defendant for the sullage works and his not adopting sufficient protective measures, the whole hillside, as marked in red dotted lines in the plan annexed hereto, came down along with five outhouses of plaintiff's estate, causing great damage to and rendering plaintiff's estate most dangerous and unsafe. This was duly intimated to the defendant by plaintiff in his letters of the 27th July and 3rd August 1906, respectively, in reply to which the defendant in his letter No. 1423 of the 14th August 1906, denied responsibility; but stated that the hillside to the south of Combermere House was in an unsafe condition and recommended that

“protective measures should be taken; and further in reply
“to plaintiff's letter of the 20th August 1906, the defendant
“again in his letter No. 3555 of the 8th September 1906,
“repudiated all liability, while admitting that the hill was
“overcrowded with buildings and geologically unsafe.

6. “That in consequence of the defendant's gross
“and culpable negligence in introducing ‘a sullage water
“drainage system’ through the plaintiff's estate, knowing
“that the whole hill was geologically unsafe, that Comber-
“mere House was on very unsafe ground, that damage had
“accrued to the said estate previously in carrying out repairs,
“that the position chosen for laying the pipes had already
“been declared to be objectionable and dangerous to the
“safety of Combermere House, and that the hillside had
“been in a very unstable state for a long time past, and
“without adopting sufficient protective measures, plaintiff's
“estate has been seriously damaged and rendered unsafe,
“and in consequence of the defendant's repudiating all
“responsibility and liability, plaintiff has had to erect, after
“due notice to the defendant through plaintiff's legal adviser,
“dated 12th November 1906, at his own expense, protective
“works of considerable magnitude at a cost of Rs. 14,491-15-5
“as *per* account attached hereto.

7. “That due notice of suit has been given to the
“defendant under section 424 of the Civil Procedure Code.

8. “That plaintiffs pray for a decree against defendant
“for the sum of Rs. 14,491-15-5, with costs and interest,
“at such rate as the Court deems reasonable from date of
“decree to date of payment, or such other relief as the
“Court deems fit.”

In reply to this claim the defendant-Committee filed a written statement traversing generally the allegation in the plaint, and in particular pleaded: (1) that the suit for compensation was barred by the law of limitation, and (2) that plaintiffs had not given defendant-Committee the legal Statutory notice required by section 38 of the Punjab Municipal Act (XX of 1891).

The District Judge framed four issues, but found it unnecessary to deal with the third and fourth, as his finding on the first issue was fatal to plaintiffs' claim. He has, however, held upon the second issue, that the notice given by plaintiffs to the defendant-Committee on the 23rd December 1906 was both legal and sufficient for the purposes of

section 38 of the Act above referred to. This finding has not been challenged before us. The first issue was whether plaintiffs' suit was barred by limitation, and upon this issue the learned Judge finds that the injury caused by defendant-Committee's act occurred about the 3rd August 1906; that article 2 of the Limitation Act, 1877, is applicable to the case; that plaintiffs had 90 days from that date in which to sue the defendant-Committee; that the said period of 90 days expired on or about the 3rd November 1906, when the late Mr. Bliss was still alive, and that consequently the present suit, which was instituted on the 5th February 1908, is barred under the said article. He has accordingly dismissed the suit with costs.

Plaintiffs have filed an appeal from this decree to this Court, and we have heard the case elaborately argued on both sides.

On behalf of the appellants Mr. Shadi Lal argues that article 2 of the Act is not applicable to the present case for the following reasons:—

(1) In the first place the learned counsel contends that the defendant-Committee, when they constructed the sullage drainage system in 1904-05, were not acting in pursuance of any Statutory provisions. He admits that under section 120 A of the Punjab Municipal Act, the defendant-Committee were empowered to construct this drainage system, but his argument is that they cannot be said to have acted in pursuance of those Statutory powers because (a) they did not at the time inform the plaintiffs' predecessor in title, Mr. Bliss, that they were acting in virtue thereof; and (b) they did not give Mr. Bliss the notice prescribed by section 120 C of the said Act.

For the first proposition Mr. Shadi Lal relies upon the judgment of Rattigan, J, in *Ganesh Das v. C. F. Elliott* (1), and it may be conceded that that learned Judge's opinion as expressed in the case cited does lend some support to the present argument. But it must be remembered that Smyth, J., differed from his colleague upon this point, and that the latter Judge's views were subsequently endorsed by the Division Bench of this Court in *Ganesh Das v. C. F. Elliot* (2). In our opinion, and we state it with every possible respect, the latter view is correct. We cannot find any justification in the wording of article 2 of

(1) 124 P. R., 1881.

(2) 160 P. R., 1883.

the Limitation Act for the proposition that it can apply only in those cases in which the defendant at the time of doing the act informs the other party in so many words that he is acting under such and such a provision of law. We agree with Smyth, J., that "where there is a provision of law limiting the time or regulating the procedure for bringing actions for things done in pursuance of an enactment, the defendant is entitled to the benefit or protection of such provision if he honestly believed in the existence of a state of facts which, if it had existed, would have justified him under the enactment to do the thing complained of. The reasonableness of the belief is immaterial, if the belief be honest, though it is an important element in determining the question of honesty." We also agree with the same learned Judge's opinion as subsequently expressed in *Ganesh Das v. C. F. Elliott* (1) that "article 2 is evidently intended to afford protection to persons doing acts, in pursuance of some enactment in force" and, that "the limitation which it prescribes applies to all cases when the parties are intending to act upon powers given by the enactment and not merely using it as a cloak for private purposes." We cannot read the words alleged "to be in pursuance of any enactment," as used in the article to mean that the defendant, in order to claim the protection of the article, must at the time of doing the act openly allege (*i. e.*, assert) that he is acting in pursuance of a particular enactment. It is, we think, sufficient for him to show that in doing the act he was at the time under the honest belief that his act was authorised by Statute. In the present case there can be no doubt that the construction of the sullage drainage system was authorised by the provisions of Section 120 A of the Punjab Municipal Act, and whether or not the Committee actually informed Mr. Bliss at the time of undertaking the work, that they were acting in virtue of the powers so conferred upon them, it is admittedly clear that they honestly intended to act under those provisions and believed that they had power to do so. But the next argument is that the Committee are not entitled to rely upon the powers given them by section 120 A of the Municipal Act, because they did not give Mr. Bliss the Statutory notice prescribed by section 120 C. It is not clear that such notice was not given in point of fact. Admittedly, the Committee, by its letter No. 5799, dated 6th December 1899 (referred to in

(1) 124 P. R., 1881.

paragraph 3 of the plaint) did intimate to Mr. Bliss its intention to introduce a sullage water drainage system through part of his estate, and there is nothing on the record to show that the operations in connection with this scheme were brought into effect on the Combermere estate within 14 days from the date of this intimation. But even if it be assumed that proper notice was not given, we fail to see how this omission can effect the applicability of article 2 of the Limitation Act. Whether they gave the notice or not, the Committee were clearly purporting or intending to act in virtue of the powers given them by section 120 A of the Municipal Act, and it must be remembered that neither Mr. Bliss nor plaintiffs at any time complained of the absence of any such notice. Even in their plaint, which was very carefully drawn up by a professional lawyer, the plaintiffs do not allege that the committee acted illegally or *ultra vires* in constructing the sullage drainage system. All that they complain of is "gross and culpable" "negligence" on the part of the Committee in introducing the system through plaintiffs' estate under circumstances which should (as plaintiffs allege) have made it clear to the Committee that the introduction of that system through the Combermere estate would be highly dangerous. No doubt the Act provides that due notice shall be given before operations are commenced under section 120 A, but whatever right a person may have against a Committee if operations are commenced on his property in the absence of such notice, we do not consider that in a case such as the present, where no objection was taken on this score to the proceedings of the Committee during the time that the operations were being carried out, it is open to the plaintiffs at this very late stage of the case to contend that the Committee cannot be said to have been acting under the provisions of the Municipal Act, simply because the notice in question was not given. To this objection (even if it were otherwise tenable) the obvious answer would be that the plaintiffs did not at the time complain of the omission on the part of defendant-Committee to give this notice, and that even in their plaint they do not allege that the proceedings of the Committee in constructing the sullage drainage system were by reason of such omission rendered illegal or unauthorised by law. In point of fact this contention appears to be an after thought and to have been urged for the first time in this Court. But quite apart from all this, we do not think that the contention carries any weight, and in this connection we would refer to the judgment of Seton-Karr, J., in *The Col-*

lector of Farreedpore v. Gooroo Das Roy ⁽¹⁾. In that case the learned Judge, in dealing with a very similar argument, observed:—"I cannot endorse Mr. Allan's argument that the law "is applicable only where the conduct of the official has been "legal, and that the Collector must be held to have acted, "not under the Act, but altogether without and beyond the "Act, inasmuch as he acted illegally in collecting at Furreedpore what had been already paid for at Jessore, and that "illegal acts are tantamount to acts done without any law at "all, and are consequently not liable to the rule of limitation "especially laid down for injured tax-payers. The tax was "levied under colour, and by aid of the Income-tax Act, and the "meaning of the redress open to individuals under the Act is "that it should lie for acts done illegally, or against the "intent, or beyond the provisions of the law, but still under "colour of the same."

2. In the next place, the learned counsel for appellants argues that article 2 is applicable only to cases where the plaintiff seeks compensation for acts directly done in pursuance of Statutory powers and does not apply to cases where the plaintiff seeks compensation for damages resulting from the consequences of such acts. In the present case, he contends that any claim for compensation by plaintiffs preferred under section 120 A of the Municipal Act would fall under article 2, but that the present claim which is based on *tort* (i.e., the negligence of the defendant-Committee in constructing a drainage system through the Combermere estate, when they knew that the construction of such a system was eminently dangerous in that locality) does not fall under article 2 but under article 36 of the Limitation Act. Mr. Shadi Lal further wished to argue that the claim could not fall under article 2, because the defendant-Committee had expressly agreed to build proper retaining walls and had failed to do so, but we disallowed this contention as plaintiffs' claim is based, in their plaint, not upon any alleged breach of contract, but upon negligence, pure and simple. In the Court below no attempt was made to allege a breach of contract of this kind, and we refused to allow a new case to be set up for the first time in this Court.

Reverting then to the contention that article 2 applies only to cases where compensation is claimed for the acts of a public body done in pursuance of Statutory powers and does not apply

⁽¹⁾ 5 W. R., 137.

to cases where compensation is claimed for damage resulting from the consequences of such acts, we may at once state that we can find no authority in support of the argument. Both parties are agreed that so far as this case is concerned, section 24 of the Limitation Act applies, and that the starting point for purposes of limitation must be computed from the 3rd August 1906 when the damage occurred to the Combermere estate. In all such cases plaintiff's cause of action is the damage done to his estate, and this cause of action arises when the damage occurs and not when the withdrawal of support takes place (section 24 of the Act ; cf. *West Leigh Colliery Coy v. Tunnickliffe* ⁽¹⁾). The only question then is as to the article applicable to the present claim ? In our opinion, article 2 is clearly the article which governs the case. The act which was the *causa causans* was the making of the sullage drainage channel and that act was, as we have found, done by the Committee in pursuance of their Statutory powers. The mere fact that damage resulted to plaintiff's estate from the doing of that act, not immediately but after the lapse of some months, does not affect the applicability of that article, though it does postpone the accrual of the cause of action until such time as the damage occurred. There is ample authority in support of this view. In Mitra's "Law of Limitation", there is a note under article 2 to the following effect :—" If the act " complained of (such as excavating a road) does not give " rise to a cause of action until some special damage results " therefrom, (such as the falling of plaintiff's wall), the period " will, under section 24, be computed from the time when the " injury results." The learned author does not, it is true, specify what this period is, but from the fact that the observation is made as a note to article 2, the obvious inference would seem to be that in his opinion the period must be that prescribed in that article.

Again, in Starling's Commentary upon the Indian Limitation Act, under article 2, we have the following comment :—" When the time limited for bringing a suit was within six " months after the accruing of the cause of action, and the " defendants not having properly filled in an excavation, some " damage accrued to the plaintiff more than six months before " the filing of the suit, but the damage increased till within six " months before the suit was filed, it was held that the suit was

(1) 98 L. T. 4 (H. L. J.).

“ within time ; *Crumbie v. Wallsend Local Board* (1). By the “ operation of section 24, the same result would be brought about “ in this country. ” In other words, though the act of the Local Body did not *per se* result in such immediate injury to the plaintiff that he could have been entitled to sue at once for compensation, he must, in order to succeed, show that his suit for compensation was filed within the period of 90 days from the date when the injury, consequential upon the said act, actually occurred. The leading authority, however, upon questions of this kind is the case of *Roberts v. Rea* (2). In that case the head-note runs as follows :—“ Though the General Highway “ Act (13 Geo. iii, c. 71, s. 81) directs that actions against any “ persons for anything done or acted in pursuance thereof, shall “ be commenced within three calendar months after the act com- “ mitted and not afterwards ; yet if surveyors of highways, in “ the execution of their office, undermine a wall adjoining to the “ highway, which does not fall till more than three months after- “ wards, they are subject to an action on the case, for the con- “ sequential injury within three months after the falling of the “ wall. ” Lord Ellenborough, C. J., in delivering judgment, remarked that “ if this had been trespass, the action must have “ been brought within three months after the act of trespass “ complained of ; but being an action on the case for consequen- “ tial damage, it could not have been brought till the specific “ wrong had been suffered ; and that only happened within three “ months before the action brought. ” The clear inference from these authorities is that when a plaintiff seeks compensation for damages in respect not of the original act done by a public body who purport to have acted in pursuance of Statutory powers but of the consequences of such act which have resulted in injury to himself, he must under article 2 sue within 90 days from the date when such injury occurred. If he sues within such period, his suit will be in time, but if his suit is brought after the expiry of such period, his claim will be barred. It would, we think, be anomalous to hold that while a claim for compensation in respect of an act done by a public body in pursuance of its alleged Statutory powers must be brought within 90 days from the time when such act was done, a claim for consequential damage subsequently resulting from the doing of such act can be brought at any time within two years from the date when the injury arising from such act has been suffered. Article 2 was

(1) 1 Q. B. 503 (1891).

(2) 14 Rev. Reports, 335.

obviously intended to protect public bodies who purport to act in the exercise of powers given them by the Legislature against stale claims, and this principle applies with equal force to cases where the cause of action is not the doing of the act itself, but the injury which subsequently is caused by reason of the doing of that act.

We must accordingly hold that the plaintiffs' claim is barred by limitation, and their appeal must therefore fail. At the same time there is sufficient material on the file to satisfy us that plaintiffs have in point of fact been put to considerable loss by reason of the action of the defendant-Committee, and there can, we consider, be little doubt that the latter acted somewhat rashly in constructing a drainage system in a locality, which according to the opinion of their own expert, as expressed in his letter No. 188, dated 7th December 1901, was unsuitable for the purpose. In these circumstances, and bearing in mind that plaintiffs' claim fails on merely technical grounds, we think, we are justified in directing that each party shall bear its own costs, both in this and in the Lower Court, and we order accordingly.

Appeal dismissed.

— — —
No. 73.

*Before Mr. Justice Rattigan and Mr. Justice
M. Shah Din.*

BINDU,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMAT BUGLI,—(PLAINTIFF),—RESPONDENT.

CIVIL REFERENCE No. 61 of 1908.

REFERENCE SIDE. }

Muhammadian Law—Marriage—Necessity of free consent by adult female—Acquiescence.

Held that among Muhammadans marriage is a civil contract, and that as is the case with other contracts, freedom of consent in the contracting parties is one of the essential conditions of its validity.

Held, also, that when a Muhammadian female attains the age of puberty she becomes *sui juris* in the eyes of her personal law, and a contract of marriage to which she does not thereafter consent of her own free will, will not be binding upon her.

Held, further, that mere silence on the part of the plaintiff for two years after the marriage unaccompanied by any overt act such as would involve an unequivocal recognition by her of the subsistence of the matrimonial alli-

ance did not under the circumstances of the case amount to acquiescence, so as to debar her from obtaining relief in the shape of a declaration of invalidity of marriage.

*Case referred by S. Clifford, Esquire, Additional Judge,
Delhi Division, on 3rd September 1908.*

Gobind Ram, for appellant.

Gokal Chand, for respondent.

The judgment of the Court was delivered by

SHAH DIN, J.—This is a reference made by the Additional 4th Feby. 1909.
Divisional Judge, Delhi, under Section 617 of the Code of Civil
Procedure, 1882.

The material facts of the case out of which this reference has arisen are briefly as follows :—

In or about the year 1905 Mussammat Bugli, butcher by caste, who had been married to one Wali Muhammad, also a butcher, became a widow owing to the death of her husband.

Some time in 1906 the members of the brotherhood of Mussammat Bugli brought pressure to bear upon her father and brother-in-law (sister's husband) to agree to her being re-married to Wali Muhammad's younger brother, named Bindu, a boy of about five years of age, under penalty of being otherwise excommunicated from the brotherhood. A bond for Rs. 100 and another for Rs. 1,000 were taken from the father and the brother-in-law, respectively, to ensure their carrying out the wishes of the deceased husband's relatives in this particular, and their consent having been thus secured to the proposed second marriage of Mussammat Bugli, the woman, who was then about 19, and the boy Bindu then aged only five years, were united in the bonds of matrimony by the usual *nikah* ceremony being performed in the presence of the butcher fraternity.

In May 1908 Mussammat Bugli brought the suit which has led to the present reference for a declaration that her marriage with Bindu was null and void and unenforceable, principally on the ground that the *nikah* ceremony had been gone through without her consent having been obtained thereto, and that she having long before that time attained her puberty, such consent was essential to the validity of the contract of marriage.

For the defendant it was pleaded that the plaintiff had given her free consent to the marriage in question, which was therefore perfectly valid, and that in any case the marriage

could not be set aside, as the plaintiff had by her conduct acquiesced in the same, and was estopped from contesting its validity.

The first Court found that the *nikah* ceremony had been performed without the plaintiff's consent being obtained as required by Muhammadan Law, that the contract of marriage was therefore void *ab initio*, and that the plaintiff had not by her conduct in any way ratified it. Upon these findings the first Court decreed the plaintiff's claim.

On appeal the Additional Divisional Judge stated the questions which arose for determination in the following terms :—

1. Whether the *nikah* was performed without the consent of the plaintiff ?
2. Whether in any case the marriage was forced on her, and if so, whether it is binding ?
3. Whether there was subsequent acquiescence, and the marriage became binding ?
4. Whether by reason of the age of the defendant at the time, the marriage is invalid.

Upon the questions thus formulated he found (1) that the plaintiff did give her consent to the *nikah* ; (2) that the marriage was practically forced upon the plaintiff, she not having freely consented to the marriage or the *nikah* ceremony being performed, and that consummation not having taken place, the marriage should not be held as valid ; (3) that the plaintiff subsequently acquiesced in the marriage contract, and was not, therefore, now at liberty to urge that she did not freely consent to the marriage ceremony being performed ; and (4) lastly, that the marriage was not invalid by reason of the defendant's tender age at the time.

As, however, the learned Additional Divisional Judge entertained considerable doubts upon the second and third questions as set out above, which in his view were questions of some importance, he, on the basis of his findings, dismissed the plaintiff's suit contingent upon the opinion of this Court on the questions aforesaid which he has referred to this Court for decision under section 617, Civil Procedure Code, 1882.

It appears to me that so far as the second question is concerned, the view of the Additional Divisional Judge that

the marriage in question is invalid is perfectly sound, being amply supported by the provisions of the Muhammadan Law on the subject.

But before I proceed to discuss these provisions, I think it necessary to set out in some detail the finding of the learned Judge on the point of the plaintiff's consent to the marriage. He observes : " Upon the second question, however, I am quite clear that the marriage was practically forced upon plaintiff, and that she did not consent to the marriage or *nikah* ceremony being performed. It is in evidence that the brotherhood assembled 200 men or so, and insisted on the woman being married to some member of the family of her deceased husband, and she was probably told by her own family to elect to marry the defendant, who was only five or six years of age at the time, in the hope of her subsequently seeing her way out of the business, as the marriage could not then be possibly consummated.

" A writing of some sort for Rs. 1,000 was taken from her sister's husband to prevent his interference, and a bond for Rs. 100 was taken from her father to compel him to carry out the wishes of the brotherhood."

The learned Judge then goes on to say :—

" It seems to me that a marriage forced, as this one was, should not be upheld as valid, especially as consummation has not taken place ; but I can find no authority on the point under Muhammadan Law."

At the time of the marriage under consideration, the plaintiff was, it is admitted, about 19 years of age and the defendant about five ; and it is further conceded before us that Wali Muhammad, the deceased husband of the plaintiff, was an adult, and that consummation had taken place before his death, which occurred about three and a half years before suit.

It is further found by the Divisional Judge that the plaintiff did not give her *free consent* to the marriage, which was forced upon her. Such being the facts of the case, I have no hesitation in holding that the marriage in question is invalid according to Muhammadan law.

There is ample authority in support of the proposition that among Muhammadans marriage is a civil contract, and that, as is the case with other contracts, freedom of consent in the

contracting parties is one of the essential conditions of its validity.

When a Muhammadan female attains the age of puberty, she becomes *sui juris* in the eye of her personal law, and a contract of marriage to which she does not consent of her own free will, will not be binding upon her [see Tagore Law Lectures for 1873, page 291, *Abdul Kadir v. Salima* ⁽¹⁾, at pages 154-155, *Asgur Ali Chowdhry v. Muhibbut Ali* ⁽²⁾, Baillie's Digest of Muhammadan Law, pages 4, 10, 55, Amir Ali's Muhammadan Law, Volume II (2nd edition), pages 270, 271, 280 288, 289, 326, Wilson's Anglo-Muhammadan Law, pages 80 and 131, Abdul Rahman's Institutes of Mussalman Law, pages 4, 31, 32]. A few extracts from the above-cited authorities will suffice for purposes of the present case.

Baillie at page 10 of his Digest says :—

“The consent of the woman is also a condition (of the validity of the marriage contract) when she has arrived at puberty, whether she be a virgin or a ‘thuyyibah’, that is, one who has had commerce with a man ; so that according to us a woman cannot be compelled by her guardian to marry.”

Again, at page 55 of the Digest we find : “No one, not even a father or the Sultan can lawfully contract a woman in marriage who is adult and of sound mind without her own permission, whether she be a virgin or a ‘thuyyibah’. And if anyone should take upon himself to do so, the marriage is suspended on her sanction ; if assented to by her, it is lawful ; if rejected, it is null.”

The above passages are translations of the text of the *Fatawa-i-Alamgiri*, a work of high authority among Indian Mussalmans.

In Amir Ali's Muhammadan Law we read at page 270 :—

“Regarded as a social institution, marriage under the Muhammadan Law is essentially a civil contract * * * a marriage contract as a civil institution rests on the same footing as other contracts.”

At page 271 occurs the following passage :—

“Among the conditions which are requisite for the validity of a contract of marriage”, says the *Fatawa-i-Alamgiri*, “are understanding, puberty, and freedom in the contracting parties * * *”. Again at pages 288, 289 we find : “When a marriage is contracted on behalf of an adult person of either

⁽¹⁾ *I. L. R.*, VIII All., 149.

⁽²⁾ 22 *W. R.*, 403.

“sex, it is an essential condition to its validity that such person should consent thereto ; or, in other words, marriage contracted without his or her authority or consent is null, by whosoever it may have been entered into.”

The above proposition is supported by the authority of *Fatawa-i-Alamgiri*, *Fatawa Qazi Khan*, and *Sharaya*.

To a similar effect is the statement of the law by Wilson in para. 23 (page 131) of his Digest (2nd edition) : “ A sane adult of either sex is legally free to contract a marriage without the intervention of any guardian and to repudiate any marriage contract made for him or her without his or her consent.”

In Abdur Rahman’s “Institutes of Mussalman Law,” article 53 (page 31) runs as follows :—

“ A woman who has attained puberty, whether virgin or otherwise, cannot be compelled in marriage ; she must be consulted and her consent obtained.”

As regards the nature of the consent required to be obtained from an adult woman in a case like the present, and the effect of consent procured by coercion on the validity of the marriage, the authorities are equally explicit.

Amir Ali’s Muhammadan Law, page 296 :—

“ The consent may be given either in express terms or by implication. In the case of a girl who has been once married or is aware of the nature of the matrimonial contract, the consent is required to be express.”

Abdur Rahman’s Institutes, page 32 (article 54) :—

“ An adult woman who is not a virgin cannot be given in marriage unless her consent is obtained in (express) words, or by an act which implies her consent, and if consulted by a near or distant relation she remains silent, her silence does not amount to consent.”

Lastly, Amir Ali, at page 326 of his work, says :—

“ When consent to a contract of marriage has been obtained by force or fraud, such a marriage is *invalid*, unless ratified after the coercion has ceased, or the duress has been removed or when the consenting party being undeceived has continued the assent.”

The above-mentioned authorities constitute ample warrant for the view that the marriage of Mussammat Bugli with Binduto which, as found by the Additional Divisional Judge, she

did not give her free consent, and which was forced upon her by the members of her brotherhood, was invalid, and it follows that unless she is estopped or otherwise legally precluded from doing so, she is entitled to have the marriage declared of non-effect.

The Indian Contract Act expressly provides, in section 10, that an agreement is a contract only if made by the free consent of parties competent to contract, and consent is said to be not free when it is given on account of the existence of coercion, undue influence, etc.

In such cases the contract is voidable at the option of the party whose consent was so obtained. The Muhammadan Law, no less than the Indian Contract Act, recognises that the element of obligation underlying a contract of marriage springs primarily from the free consent of the contracting parties when each is *sui juris*, and that where the so-called consent is constrained or involuntary, the party so consenting will not be held bound by the resulting contract.

For the foregoing reasons my opinion on the second question referred by the Additional Divisional Judge is that the marriage in question is wholly invalid.

Upon the third question referred, I am equally clear that the alleged acquiescence on the part of Mussammat Bugli in her enforced matrimonial alliance with Bindu is not established, so as to preclude her from impugning its validity. In a case like the present, the question of acquiescence is a mixed question of law and fact, as its decision hinges upon the legal inference to be drawn from all the facts disclosed by the evidence adduced by the parties. The sole circumstance on which the Additional Divisional Judge has based his finding of acquiescence in this case is that the plaintiff has kept silence for two years after the enforced marriage, and that she has not come forward earlier to have it set aside. "The question is," says the learned Judge, "whether plaintiff's silence for two years can be treated as acquiescence, I think it certainly points to acquiescence and should be held to be such, and that it validates the marriage, though originally she did not freely consent, and the marriage was really forced upon her." Now, it is in evidence that the plaintiff is a *pardanashin* lady, and that she wept when the proposal of a marriage with Bindu was made to her, and gave no explicit answer, her mother authorizing the *nikah* to be read. Though it has been found that she did consent

to the marriage, the so-called consent was extorted under such circumstances, and the pressure that was brought to bear upon her father and brother-in-law (apparently the only male members of the family) by the leading men of her brotherhood to agree to the ceremony being performed was so great, that it was impossible for the plaintiff to assert her independence for a long time after the ceremony aforesaid.

The seclusion in which Muhammadan women are obliged to live, according to the custom of the country, and the many restraints upon the exercise of independent action on their part which that seclusion imposes, must always be given due weight to in a case like the present; and when that is done, mere silence on the part of the plaintiff for two years after the so-called marriage, unaccompanied by any overt act such as would involve an unequivocal recognition of the subsistence of the matrimonial alliance, loses the importances that it would have possessed under a different set of circumstances.

The husband was a mere child with whom consummation of marriage was impossible for many years to come; the father and the brother-in-law of the plaintiff were, as we have seen, unwilling instruments of social oppression in the hands of a brotherhood callously intent upon repressing the least attempt at the exercise of free volition on her part; she must have been told, as the Additional Divisional Judge hints, that the *nikah* ceremony may be gone through in order to appease the brotherhood and satisfy their sense of honour, but that she could throw off the galling yoke as soon as the first favourable opportunity presented itself. Under these circumstances, it is somewhat difficult to perceive how she could,—and indeed why she should,—have taken any action immediately or soon after her enforced marriage to have it set aside.

It is both difficult and odious for a *pardanashin* woman to have resort to a Court of law to obtain redress in respect of a social wrong, however serious it may be, and mere inaction or a little delay on her part in safeguarding her rights or in seeking a remedy provided by law, does not, as a rule, taken by itself, amount to acquiescence in that wrong so as to debar her from obtaining proper relief.

I therefore hold, differing from the Additional Divisional Judge, that the plaintiff's silence for two years in this case does not prove that she had acquiesced in her marriage with

the defendant, and that she is not precluded from obtaining a declaration as to its invalidity.

Under section 621 of the Code of Civil Procedure, 1882, I would set aside the decree of the Lower Appellate Court and restore that of the Court of first instance, and I would award to the plaintiff her costs throughout.

4th Feby. 1909.

RATTIGAN, J.—I entirely agree and have nothing to add to my brother's exhaustive judgment. The order will be as proposed by him.

No. 74.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

IMAM BAKHSH AND KHUDA BAKHSH,—(DEFENDANTS),
—APPELLANTS,

APPELLATE SIDE. }

Versus

NUR MUHAMMAD,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 1243 of 1907.

Pre-emption—Limitation—Rights accrued before and after commencement of Punjab Pre-emption Act, II of 1905, sections 28 and 29.

Held, that every claim to the right of pre-emption made after the commencement of the Punjab Pre-emption Act, II of 1905 (i.e., the 11th May 1905) is governed by the provisions of that Act whether that right has accrued *before* or *after* its commencement.

Held also, that the Act purports to fix one year as the period of limitation for every claim to pre-emption and that any one whose cause of action arose and against whom limitation has begun to run under article 120 of the Indian Limitation Act, 1877, but which has not expired before the commencement of the Act, will have one year within which to sue from the date of the commencement of the Act under section 28, and any one whose cause of action arises or whose right to sue accrues *after* the commencement of the Act or against whom limitation began to run for the first time *after* the commencement of the Act will have one year within which to sue, such year to be computed from the periods laid down in that section.

Held therefore, that a suit for pre-emption brought on the 8th February 1907, in respect of a sale, dated the 2nd September 1904, is barred by limitation under section 23 of the Act notwithstanding that mutation was not effected till the 23rd February 1906.

Ladhu v. Sardar Muhammad ⁽¹⁾ differed from.

Abas Ali Shah v. Sher Zaman ⁽²⁾ differed from.

Thakaria v. Daya Ram ⁽³⁾ followed.

Surta v. Fatteh Chand ⁽⁴⁾ referred to.

*Miscellaneous Appeal from the order of H. A. Rose, Esquire,
Divisional Judge, Multan Division, dated the 10th October
1907.*

Ishwar Das, for appellants.

Shah Nawaz and Harris, for respondents.

The judgment of the Court was delivered by—

ROBERTSON, J.—The facts, as stated, upon which the arguments were based, are as follows :—

8th Jany. 1909.

The land in suit was sold on 2nd September 1904, that is before the commencement of the new Pre-emption Act, Punjab, II of 1905, which came into force on 11th May 1905. On the 23rd February 1906 mutation was effected.* The plaintiff is a *khewatdar* in the village in which the land is situate, while the defendants are not proprietors in the village. Hence the plaintiffs had a right of pre-emption, and a cause of action in respect of the sale of the land in dispute before the new Pre-emption Act came into force, and that right was maintained by section 12 of the new Act. The question before us is, what was the period of limitation and from what date did it run? We are not ourselves in any doubt whatever as to what the answer to these questions should be, but we will proceed to discuss the question carefully in view of the fact that it is argued that the only judgment directly bearing upon the point is that of a Single Bench, *Ladhu v. Sardar Muhammad* ⁽¹⁾. This, however, does not appear to be correct. *Thakaria v. Daya Ram* ⁽³⁾ is also in point. We accept at once the proposition that in view of the provisions of section 2 (3) of the Pre-emption Act, it is the provisions of this Act which have to be applied to this case. But the question is, what sections and provisions of the Act govern the case?

*NOTE BY EDITOR.—This suit was instituted on the 8th February 1907 and would have been governed by article 120 of the Indian Limitation Act before the new Punjab Pre-emption Act, 1905, came into force.

The argument of the learned counsel for the respondent was that section 29 of the Act is so to speak the substantive

⁽¹⁾ 131 P. R., 1907.

⁽²⁾ 22 P. R., 1908.

⁽³⁾ 143 P. R., 1907.

⁽⁴⁾ 17 P. R., 1908 (F. B.).

NOTE BY EDITOR.—The same learned Judges followed this judgment in Civil Appeals Nos. 1334 of 1907 and 773 of 1908, decided on the same day.

section dealing with limitation, and that a claim to pre-emption cannot be held to be barred unless it is barred both under section 28 and under section 29. No arguments which appear to us to have much force have been urged in support of this view, which appears to us to be contrary, not only to the ordinary canons of interpretation, but to the plain commonsense view of the Act itself. What the Act purports to do, it appears to us, is to fix one year as the period of limitation for every claim to pre-emption brought after the commencement of the Act, it does not intend to, nor does it in fact in any case, extend the period beyond one year from the date when limitation has once begun to run. Thus if the sale took place before the commencement of the Act, the plaintiff had a right of pre-emption under the old Act, his cause of action had arisen, and limitation had begun, to run against him, and we think his period of limitation if it had not expired before the Act came into force, is clearly one year from the date of the commencement of the Act. Section 28 is the saving section, which, it is now universally agreed, should find its place in all Acts which alter and restrict periods of limitation. But to hold that section 29 applies and creates a perfectly new starting point, instead of section 28 supplying a period of grace, is to introduce a very novel, and we venture to think, dangerous and undesirable principle of interpretation. The difficulties which it would involve are obvious.

For instance, if section 29 applies to all cases, a fresh period of limitation might be created in cases in which the claim was already barred before the commencement of the Act, a contingency we cannot believe for a moment to have been contemplated by the legislature. An alienation might have taken place, even by registered deed, twenty years ago, but if mutation had not taken place, if the principle laid down in *Lathu v. Sardar Muhammad* (1) is to be applied; should mutation take place at any time after the commencement of the Act, there would be a fresh period of one year created within which the claimant could sue. Nothing but the clearest and most unmistakeable language, free from all ambiguity, would convince us that the legislature has deliberately or inadvertently passed such an enactment, and we certainly find no such language in the Act before us. It appears to us that there is no ambiguity in the Act, that it is clear, consistent and logical. It has provided

that any one whose cause of action arose, and against whom limitation has begun to run before the commencement of the Act, shall still have one year within which to sue from the date of the commencement of the Act under section 28, and any one whose cause of action arises, or whose right to sue accrues after the commencement of the Act, or against whom limitation begins to run for the first time after the commencement of the Act, shall have one year under section 29 within which to sue, such year to be computed from the periods laid down in that section. The table of contents may not be of great importance, but we think it has correctly stated the facts when it says :—

Section 28.—Limitation as regards rights already accrued.

Section 29.—Limitation for future.

We have no hesitation ourselves as to the correctness of this view. *Ladhu v. Sardar Muhammad* ⁽¹⁾ no doubt expresses the contrary opinion, that is, the judgment of a single bench. It is remarked in that judgment that section 28 was simply intended to provide a period of one year during which, in spite of the new period provided by section 29, parties might exercise right of pre-emption which had already accrued to them and which might be barred under section 29. With that we certainly concur, but we are unable to accept the further proposition that section 29 is the substantive section fixing the period of limitation, and by section 2 (3) it applies to every claim to the right of pre-emption whether that right has accrued before or after its commencement. With every deference we think that there is nothing in the Act to support that proposition. The learned Judge assumes that section 2 (3) must allude to section 29 only of the Act, but there does not appear to us to be any ground for this assumption or for excluding section 28 from the purview of section 2 (3). *Thakaria v. Daya Ram* ⁽²⁾ is an authority on the other side, and as it is a decision of a Division Bench, it must necessarily carry greater weight. Apart from this, we find it gives expression to the views which we ourselves entertain upon the question before us.

It is therein pointed out that what sections dealing with periods of limitation are limited to, is the fixation of periods within which parties can exercise, not their alleged rights, which may be found non-existent on enquiry, but their right to sue. In the course of that judgment it is remarked : “ Section “ 29 applies clearly only to the future. Section 28 is intended

(1) 131 P. R., 1907.

(2) 143 P. R. 1907.

“to provide a period of at least one year for all persons who
“had the right to sue at the commencement of the Act, section
“29 provides for the period of limitation in all cases in which
“the right to sue accrues after the commencement of the Act.”

It is urged that a different view was taken by a Division Bench in *Abas Ali Shah v. Sher Zamam* (1). But in that case the substantive decision was in fact differed from by the Full Bench in *Surta v. Fateh Chand* (2) which was delivered after that in *Abas Ali Shah v. Sher Zaman* (1), though it appears before it in the *Punjab Record* and the facts were entirely different. The question of limitation was not separately discussed in *Surta v. Fotteh Chand* (2), but *Abas Ali Shah v. Sher Zaman* (1) was so far differed from it that in the Full Bench ruling it is laid down that in all suits filed after the commencement of the Act, the priorities laid down in section 12 of the new Act must be the basis of decision, and that there can be no decision under the terms of the old Act such as appears to have been contemplated by the remand order in *Atas Ali Shah v. Sher Zaman* (1).

Our conclusion, therefore, is—In our opinion, in all cases in which a right to sue had acerued before the commencement of the Act, and limitation had begun to run against the claimant, but had not expired upon the commencement of the Act, section 28 applies, and the claimant will have one year from the date of the commencement of the Act in which to sue.

In cases in which the right to sue accrues after the commencement of the Act, and the period of limitation has not begun to run before the commencement of the Act, the claimant will have the period of one year as laid down in section 29 from the date on which limitation begins to run. In this case, therefore, the claimant had one year from the commencement of the Act, 11th May 1905, within which to sue, and the suit is consequently barred by limitation. The appeal must succeed and is accepted with costs against the respondent.

Appeal accepted.

(1) 22 P. R., 1908.

(2) 17 P. R., 1908. (F.B.)

No. 75.

Before Mr. Justice Rattigan and Mr. Justice
Shah Din.

RAM CHAND, BANKER OF SIALKOT, —(DEFENDANT),

—APPELLANT,

Versus

MR. JOHN BARTLETT, SOLICITOR OF LONDON,—

(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 1194 of 1908.

APPELLATE SIDE.

Suit on foreign judgment—Jurisdiction of High Court of Judicature in England over Indian British subjects residing in India under contract made and broken in England—Interest.

Held that, according to English law, it is the duty of the debtor to seek out his creditor and pay him wherever he may be, and therefore the fees of a Solicitor residing in England for work done are payable in England when no particular place of payment is named, and non-payment is a breach within the jurisdiction of the contract, which was to be performed in England.

Held, also, that a defendant who has made and broken a contract in England, and who is a British subject, is amenable to the jurisdiction of the High Court of Judicature in England after he has been properly served with notice of action in accordance with the English rules of procedure notwithstanding that he is a native of British India and residing there.

Held, also, that a judgment passed in England against a defendant in India who has been duly served with a writ of summons but who did not enter appearance or deliver a defence, when the proceedings have been strictly in accordance with the existing rules, must be considered as one passed on the merits.

Held, further, that the English Statute as to judgments carrying interest does not apply to India nor does such a case fall within the scope of Act XXXII of 1839 and plaintiff suing on a foreign judgment cannot therefore recover more than appears on the face of the judgment.

Further appeal from the decree of W. Malan, Esquire, Additional Divisional Judge, Sialkot Division, dated the 14th October 1908.

Shadi Lal, for appellant.

Grey and Charan Das, for respondent.

The judgment of the Court was delivered by

SHAH DIN, J.—This appeal has arisen out of a 5th March 1909. suit brought by the respondent, who is a Solicitor practising in London, on an *ex parte* judgment obtained by him on the 20th March 1906 in the King's Bench Division of the

High Court of Justice in England against the appellant, a Sialkot banker, for £120-14s.-1d., being equivalent to Rs. 1,810-9-0, in respect of the balance of fees, interest and costs. The plaintiff's allegations briefly were, that he had worked in England as defendant's Solicitor from the 18th September 1899 to the 21st July 1905 in connection with certain legal proceedings taken for the purpose of recovering debts due to the defendant from a number of persons, resident in England ; that after settlement of accounts a sum of £107-19s.-5d. was found due to him by the defendant ; that on the defendant's failing to pay the said amount, he (the plaintiff) sued the defendant for recovery of the same in the High Court of Justice in England ; that a writ of summons having been duly served on the defendant and the latter not appearing to defend the suit, an *ex parte* judgment was obtained by the plaintiff against him for £120-14s.-1d., including interest and costs. Adding Rs. 36 as interest to the amount of the decree, the plaintiff brought the present suit for recovery of Rs. 1,846-9-0 with interest at 6 per cent. from the date of the institution of the suit to the date of realization.

The pleas of the defendant in substance were : (1) that the High Court of England had no jurisdiction to pass the judgment on which the plaintiff's suit was founded, inasmuch as (a) the defendant was not a British subject ; (b) he had never resided in England ; (c) no contract for the payment of fees and expenses in respect of which the plaintiff had sued in England had been made in that country or was to be performed there, nor did a breach in respect thereof take place in England ; (d) he had not submitted himself to the jurisdiction of the High Court ; (2) that the judgment in question being *ex parte* and not on the merits was not final, and hence was not binding on the defendant ; and (3) that the judgment was obtained by fraud.

Upon these pleadings, the Court of first instance framed only one issue, *viz.*, " whether the plaintiff was entitled to sue on the strength of the judgment passed in his favour by the High Court of England," and found that the plaintiff was not so entitled to sue, on the grounds that the High Court in question had no jurisdiction over the defendant and that the judgment sued upon was one passed *ex parte* and not upon the merits. The plaintiff's suit was, therefore, dismissed.

On appeal, the learned Divisional Judge, after expressing an opinion that the High Court of England would have

jurisdiction over the defendant and the judgment obtained against him by the plaintiff would constitute a valid cause of action in this country if the defendant were a British subject, remanded the case for further enquiry on the following three issues, which, he considered, arose out of the parties' pleadings:—

- (1) Is the defendant not a subject of the British Crown ?
- (2) If he is not a subject of the British Crown, had the High Court of Justice in England competent jurisdiction ?
- (3) Was there no breach of contract in England ?

In the return made to this order of remand, the Court of first instance found on the issues above specified :

- (1) that it was not shown that the defendant was not a subject of the British Crown ;
- (2) that the first issue being found against the defendant, no finding was called for on the second ;
- (3) that there was a breach of the contract entered into between the parties in England.

On the return being submitted to the Divisional Judge, the latter in a well-considered judgment held, mainly on the authority of *Moazzim Hossein Khan v. Raphael Robinson* ⁽¹⁾, that the judgment sued upon was in all respects a valid foreign judgment which could be legally made the basis of action in this country, and that (differing in this respect from the Calcutta decision above cited) the plaintiff was entitled to recover the amount decreed by the High Court of England with interest thereon up to the date of suit, *viz.*, Rs. 1,846-9-0.

The plaintiff's suit was decreed accordingly.

From that decree a further appeal has been preferred by the defendant to this Court, and the case has been argued by the learned counsel on both sides with considerable forensic ability. For the appellant Mr. Shadi Lal has contended :

(¹) *I. L. R.*, XXVIII *Calc.*, 641.

(1) that the plaintiff's suit on the foreign judgment did not lie, because—

(a) the High Court of England, which passed the judgment in question, had no jurisdiction over the defendant, and

(b) the said judgment was not passed on the merits ;

(2) that the plaintiff was not entitled to claim interest on the amount decreed in England.

Certain other points not covered by the above contentions are raised in the written grounds of appeal, but they were abandoned in argument and therefore need not be considered in this judgment.

I shall now proceed to deal with the above contentions *seriatim*.

In connection with the first contention Mr. Shadi Lal has conceded that the principle of Private International Law which governs the exercise of jurisdiction by a foreign Court over a defendant in an action *in personam* is correctly stated by Dicey in his "Conflict of Laws" (2nd Edition), p. 361, in the following terms :—

"Rule 83.—In an action *in personam* in respect of any cause of action the Courts of a foreign country have jurisdiction in the following cases :—

* * * * *

"Case 2.—Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of that country."

* * * * *

The learned counsel has, however, argued with reference to the definition of the word "country" as given at p. xxxiii and p. 70 of Dicey's Digest (*viz.*, "a country means the whole of a territory subject under one sovereign to one system of law") that for the purpose of applying the above rule to the present case England must be treated as one "country" and British India another, and that no regard must be paid to the fact that both these countries, each of which has a distinct and separate system of law governing the persons residing therein, are for political purposes subject to the authority and control of one common sovereign. Construing the rule cited in this restricted sense, it has

been urged that though the defendant is a British subject, yet, as he is resident and domiciled in British India and governed by the Indian legal system, he is not a subject of the sovereign of England, taking the latter country to mean the "law district" of England, and not in the extended political sense of a "realm" or "state" with reference to the English sovereign and his authority over the British dominions and over his subjects resident therein. This contention, so far as regards the restricted operation of the rule of Private International Law as formulated by Dicey in his Digest, has, doubtless, much force, but, as Mr. Grey has pointed out, it must be remembered that the learned author is treating in this part of his book of non-English judgments, *i.e.*, judgments of Courts other than the High Court of England, and is laying down rules in accordance with which recognition will be accorded in England to such judgments when they are used as causes of action in actions *in personam* brought in that country. So far as the jurisdiction of the High Court of England under similar circumstances is concerned, we find that Dicey states the law applicable in the following terms at pages 222, 233 of his Digest :

"When the defendant in an action *in personam* is, at the time of the service of the writ not in England, the Court (*i. e.*, the High Court) has, subject to the exceptions hereinafter mentioned, no jurisdiction to entertain the action.

* * * * *

"*Exception 5.*—The Court has jurisdiction, whenever the action is founded on any breach or alleged breach, in England of any contract, wherever made, which, according to the terms thereof, ought to be performed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

The above exception is founded upon Order XI, rule 1 (*e*), (Rules of the Supreme Court, 1883), which Order has a statutory force "as a complete Code governing service out of the jurisdiction" (per Fry, L. J., in *Whaley v. Busfield* ⁽¹⁾) and gives the High Court of England jurisdiction over subjects of the British Crown wherever they may reside. At page 55 of his Digest, Dicey explains, from the point of view of Private International Law, the true basis of the rule in question, which,

(¹) (1886) L. R., 32 Chancery Division, 131.

he says, embodies an extension of the "principle of submission," set out by him at page 44, — a principle, the validity of which has not been and cannot well be disputed by Mr. Shadi Lal. But it seems to me that the above rule can also be defended as being perfectly in accordance with another principle of Private International Law, *viz.*, the "principle of effectiveness," discussed by Dicey at pages 40—42 of the Digest, when we take into consideration rule 6 of Order XI, which runs as follows :—

"When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him."

The fact of the defendant being a British subject or of his residing in British dominions, is thus a matter of special significance, and a pointed reference to it in rule 6 of the Order unmistakably shows that a writ of summons is intended to be served on a British subject outside England, not merely by way of giving him notice of the institution of an action against him in England, but as an effective exercise of jurisdiction over him, so far as the circumstances of the case permit, making it obligatory upon him to appear and defend the action. The "principle of effectiveness" is thus explained by Dicey (page 41) :

"An effective judgment means a decree which the sovereign under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore his Courts can, if he chooses to give them the necessary means, enforce against such person ; to look at the same thing from the other side, an 'effective judgment' is a decree which gives to the person who obtains rights under it an actual and not merely a nominal right, that is, a right which, if aided by the sovereign whose Court has delivered the judgment, he can enforce."

This "test of effectiveness," as Dicey points out at page 42, is only an application further of that general recognition of rights duly acquired under the law of any civilized country, which is the true basis of all the rules of Private International Law. Considered from this point of view, can it be said, as urged by Mr. Shadi Lal, that the defendant in this case, though a British subject, was yet not a subject of England, and that under Order XI, rule 1 (e), and rule 6, the High Court of England had no jurisdiction over him at all, even when the writ of summons was duly served upon him in British

India? I think not; and there is ample authority in support of this view. In support of his contention to the contrary, Mr. Shadi Lal has gone the length of arguing that Order XI is wholly *ultra vires*, and that it must be treated as such by this Court. Upon this point, however, he admits that the weighty opinion of Mr. Dicey is against him, and so is the opinion of Mr. Westlake in his *Private International Law*—4th Edition, 1905 (Chapter X, pages 237—242), and that of Mr. Foote (see *Private International Jurisprudence*, 3rd Edition, pages 345—349). In this connection the observation of Cotton, L. J., in *Whaley v. Busfield* ⁽¹⁾ (at page 131) are significant: “service out of the jurisdiction is an interference “with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament “gives them jurisdiction over British subjects wherever they “may be, such jurisdiction is valid, but apart from statute “a Court has no power to exercise jurisdiction over any one “beyond its limits.”

Mr. Shadi Lal has relied on the decision of the House of Lords in the *British South Africa Co. v. The Companhia De Mocambique and others* ⁽²⁾ to show that the rules of procedure made under the Judicature Acts do not confer on the English Courts a jurisdiction which they did not already possess, and proceeding upon that basis he has argued that as Order XI, rule, 1 (e), for the first time conferred on the English Courts jurisdiction over British subjects not resident within the jurisdiction, the said Order is *ultra vires*. But the decision cited does not at all support the argument sought to be based upon it. All that was actually held in that case was that rule 1 of Order XXXVI, framed under the Judicature Acts to the effect that “there shall be no local venue for the trial of any action except where otherwise provided by Statute,” did not confer on the English Courts any new jurisdiction which they did not possess before; in other words, that by reason of the abolition of local venues the Supreme Court of Judicature had not acquired jurisdiction to entertain an action to recover damages for a trespass to land situate abroad, which jurisdiction admittedly did not exist before the Order in question came into force. It was conceded for the plaintiffs in that case that prior to the Judicature Acts the jurisdiction claimed could not have been exercised in Eng-

⁽¹⁾ *L. R.*, 32 *Chancery Division*, 123.

⁽²⁾ *L. R.*, 3 *Appeal Cases*, (1893), 602.

land, but it was argued that the only impediment to its exercise was the technical one that the venue in such a case must be local, and that the rules made under the Judicature Acts which had abolished local venues had removed that impediment, and the Court could, therefore, entertain and adjudicate upon claims relating to trespass to land situate abroad. Lord Herschell, L. C., after an elaborate discussion of the circumstances that gave rise to a technical distinction between local and transitory actions in England and of the development of the law which determined the venue or place of trial of issues of fact, showed that the argument for the plaintiffs was based upon a misconception of the legal effect of Order XXXVI, rule 1, and that the statutory abolition of the local venues did not at all amount to a removal of the supposed barrier to the exercise of a jurisdiction on the part of the English Courts in respect of claims regarding land not situate in England. It was pointed out that the rules relating to venue did no more than regulate the manner in which pre-existing rights were to be enforced, but that in respect of trespass to land situate abroad there was no right of action either at Common Law or in Equity which the English Courts could ever recognise or enforce.

The rule of the English Common Law on this subject is in conformity with the rules of Private International Law that regulate the jurisdiction of a Court over immoveables situate abroad, and which are founded, as Dicey shows at pages 201—202 of his Digest, on the principle of "effectiveness" to which I have referred above.

The contention that Order XI, rule 1, is *ultra vires* presupposes that it confers on the Supreme Court of Judicature a new kind of jurisdiction over a defendant which it did not possess before, and this necessarily involves a denial of the operation of the "principles of effectiveness and submission," which as pointed out by Dicey, lie at the root of the extra-territorial or international competence of a Court, within the sphere of the obligations (using the term in its widest acceptance) for the enforcement of which a writ of summons has to be issued by the English Court for service out of the jurisdiction. Not only is there no authority for this position, but there is ample material both in text-books of undoubted weight (as I have shown above) and in the decisions of English Courts in support of the contrary view, so far at least as the exercise of jurisdiction over British subjects is concerned.

In Chapter IX of his treatise on Private International Law, which contains an interesting historical sketch of the genesis and growth of the doctrines which have prevailed in Europe about jurisdiction as connected with the choice of a law with regard to obligations, Westlake, after speaking of the operation of the *forum contractus* in the Roman Law and in some of the legal systems derived therefrom, says :

" Passing now to our own side of the channel, we find ourselves in the midst of quite a different state of things. At the commencement of legal memory the superior Courts already possessed an original jurisdiction co-extensive with the realm : there were no such local jurisdictions within England as could require any rules by which to distinguish on the ground of domicile, place of contract, or otherwise, the cases which fell under one of them from those which belonged to another. There was, indeed, room for such considerations in determining what causes the one national or royal jurisdiction would entertain, as contrasted with those which it would hold to belong only to foreign Courts, but certain very peculiar doctrines prevented their being much attended to. At Common Law, it was necessary that the writ by which the action was commenced should be served on the defendant personally and within the realm ; hence, if the defendant was not of the realm, there were no means of obtaining a judgment against him on the ground of his domicile or allegiance being English. On the other hand, if the writ was personally served within the realm, a judgment could be obtained against the defendant even though his domicile and permanent allegiance were foreign

* * * * *

" (pp. 228, 229). Not every action, however, for which the writ could be served within the realm, could be tried in England. At Common Law there were rules of venue, that is of the locality from which a jury ought to be summoned to try a question of fact ; and these rules, though perhaps devised for no other purpose than to portion out the business as to which the competence of the superior Courts was undisputed, re-acted on that competence by limiting it to actions for which a venue could be assigned. The classification of personal actions was into local and transitory. The former were those, such as trespasses to land, of which the causes could not have occurred elsewhere than where they did occur. The venue for actions of this class was the county * * * * *

" in which the cause occurred : hence for local actions it
 " was necessary, besides personal service on the defendant
 " within the realm, that the cause should have occurred in
 " England. Transitory actions were those of which it was
 " said that the cause might have occurred anywhere, as a
 " personal injury or a breach of promise, and for these the
 " venue was said to be arbitrary, that is, the plaintiff
 " might lay the venue in any county he pleased. Their
 " real place of occurrence therefore might have been abroad,
 " quite as well as in a different county from that in which
 " the venue was laid, and if the writ was personally served
 " in England, there was no further condition to
 " satisfy." (p. 230) * * * * *
 " The competence both of the Courts of Chancery and of the
 " Courts of Common Law, with regard to matters and defend-
 " ants in some way connected with the realm, was extended
 " by Statute, or by orders made under statutory authority,
 " at various times from the reign of George II down-
 " wards." (p. 231).

On the same subject Foote has the following passages in
 his Private International Jurisprudence (pages 342—344) :
 " The jurisdiction which entitles the tribunals of any State
 " to pronounce judgment *in personam*, arises from its sovereign
 " territorial power * * * * * The subjects of
 " a State, bound to it by the tie of allegiance, are in a
 " special and theoretical sense under the control of their lawful
 " sovereign wherever they go. This is illustrated in English
 " Law by the practice of serving a writ upon a British subject
 " out of the jurisdiction, but notice of the writ only upon a
 " foreigner." (p. 342).

" * * * * *

" The element of the English Common Law, which, as a
 " matter of fact, prevented these questions from ever arising
 " in its administration, was the technical rule of venue, which
 " divided all actions into two exhaustive classes, *local and tran-*
 " *sitory*. Local actions were those connected in any way with
 " the soil, which it was always necessary to bring in the
 " county where the cause of action arose, and the distinction
 " arose in the following way (p. 343). * * *

* * * The consequence was that any contract, not
 " directly connected with the soil, could be sued on in an
 " English Court without regard to the place where it arose
 " or was to be performed, if the defendant could be only

“ rendered amenable to the Court’s process, and service
 “ could be effected upon him according to its regulations
 (p. 344).

“ The former practice of the Common Law and Chancery
 “ Courts differed in several essential points. At Common
 “ Law personal service within the realm was necessary until
 “ 1852. The Common Law Procedure Act of that year permit-
 “ ted service abroad * * * * in actions against both
 “ British subjects (S. 18) and foreigners (S. 19), when there
 “ was a cause of action which arose within the jurisdiction,
 “ or in respect of the breach of a contract made within the
 “ jurisdiction * * * * (p. 344).

“ The subject, however, is now regulated by Order XI,
 “ rules 1—7, of the Rules made under the Judicature Acts,
 “ 1873, 1875, which is intended by the Legislature to be
 “ exhaustive, and to supersede the former practice. * *
 “ * * * * (p. 345).

“ * * * * *

“ The rule is, therefore, one dealing with jurisdiction, not
 “ with procedure ” (p. 346).

It will be seen from the above passages that originally
 the English Courts could, and did, exercise jurisdiction over
 British subjects resident abroad, but that owing to the techni-
 cal rules of venue, which led to the distinction between
 local and transitory actions, such jurisdiction could not be
 exercised at Common Law in consequence of the necessity,
 before the passing of the Procedure Act of 1852, for effecting
 personal service on the defendant within the territorial limits
 of the English Courts. This impediment was removed by the
 Act aforesaid (section 18), and finally the whole subject of
 exercising jurisdiction over a defendant resident abroad was
 placed on a clear statutory footing by the rules framed under
 the Order referred to above.

That this is the correct view of the question is placed
 beyond doubt by a recent English authority—*Duder v.*
Amsterdamsch Trustees Kantoor ⁽¹⁾, which lays down that to
 allow service of the writ out of the jurisdiction in a case
 within the terms of Order XI, rule 1 (g), is not to extend
 the jurisdiction, but to enable the old jurisdiction to
 be exercised in cases where formerly this jurisdiction
 could not have been exercised by reason of defective
 rules of procedure. Byrne, J., after referring to the case

(1) *L. R.*, 2 *Chancery Division* (1902), 132.

of *British South Africa v. Companhia Mocambique* ⁽¹⁾ (on which, as noticed above, reliance has been placed in the present case by the appellant's counsel) observes at page 142 of the report:

" But it is argued that there is no precedent or authority
 " for the exercise of the jurisdiction *in personam*, unless against
 " persons actually within this country, and that to allow
 " service of the notice of writ upon a foreigner resident abroad,
 " and then to act *in personam* against him, would in effect
 " be to enlarge or extend the jurisdiction of the Court in a
 " manner not authorised by principle or authority.

" It has been several times laid down that the rules
 " under the Judicature Acts are rules of procedure only, not
 " intended to effect, and not affecting, the rights of parties
 " * * * * *

" In the present case, the service is authorised by the
 " terms of the rule I have referred to, and I consider that
 " to allow service in accordance with that rule is not to ex-
 " tend jurisdiction, but to enable the old jurisdiction
 " to be exercised in a case, where at one time it could
 " not have been exercised by reason of defective rules of
 " procedure."

On this part of the case, Mr. Shadi Lal has placed reliance upon the following observations of Dicey at page 54 of his Digest:—

" It is sometimes asserted that the High Court recognises
 " the jurisdiction of the *forum obligationis*. * * * * *
 " For this assertion, however, if made in its full breadth, no
 " decisive authority can be cited. Neither at Common Law nor
 " in Equity did the *mere fact* of a tort having been
 " committed, or of a contract having been made or
 " broken, in England, give the Courts jurisdiction over a de-
 " fendant not present in England * * * * *

This passage, however, in no way helps the appellant in this case, nor does it in the least detract from the weight of the authorities I have discussed above.

It is doubtless true that the *mere fact* (the words are italicised by Dicey himself) of a contract having been made or broken in England did not, according to English

⁽¹⁾ *L. R. 3 Appeal Cases* (1893), 602.

Law, give the English Courts jurisdiction over a defendant not present in England, nor has that been contended for in this case. But the matter obviously assumes a different aspect where the defendant, who has made and broken a contract in England, happens at the same time to be a British subject, for then the "principles of effectiveness and submission" laid down by Dicey, to which reference has been made above, come into play, so far as the extra-territorial competence of English Courts to deal with the cause of action is concerned, and the "principle of allegiance" renders it obligatory upon the defendant to submit himself, after he has been properly served with notice of action in accordance with the English rules of procedure, to the jurisdiction of the said Courts.

The following leading English decisions are sufficient, in my opinion, to establish the proposition that in respect of an action *in personam* the High Court of England would have jurisdiction where the defendant, at the time of the judgment in the action, was a British subject. In *Shibbsy v. Westenholz and others* (1) Lord Blackburn says :—

"We admit with perfect candour that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Courts of the United States would be, can the island of Great Britain pass a law to bind the whole world? We think in each case, the answer should be, No, but every country can pass laws to bind a great many persons; and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.

"Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them."

In a later case, *Rousillon v. Rousillon* (2), Fry, L. J., after expressing his concurrence in the general principles governing the exercise of jurisdiction by a foreign Court as laid down in *Shibbsy v. Westenholz*, (1) says at page 371 :

(1) *L. R.*, 6 Q. B., 155.

(2) 14 *Chancery Division*, 351.

“What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case (*Shibsby v. Westenholz* (1)) and to *Copen v. Adamson*, they may, I think, be stated thus:—The Courts of this country consider the defendant bound when he is a subject of the foreign country in which the judgment has been obtained * * *.”

In the recent case of *Sardar Gurdayal Singh v. Raja of Faridkot* (2) Lord Selborne says :

“All jurisdiction is properly territorial, and *extra-territorium jus dicenti impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it and when they are living in another independent country. * * * *
“As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction, but no territorial legislation can give jurisdiction, which any foreign Court ought to recognise, against foreigners, who owe no allegiance or obedience to the power which so legislates.”

In the present case no less than four circumstances co-exist, which, in accordance with the principles laid down in the authorities cited above, in my opinion confer jurisdiction on the High Court of Justice in England over the defendant, namely,—

- (1) The defendant is a British subject ;
- (2) He made a contract with the plaintiff in England which was intended to be, and has actually been, performed in that country ;
- (3) The breach of the contract has taken place in England ;
- (4) Service of the writ of summons has been effected upon him in British territory, in accordance with the rules of procedure laid down for observance by the High Court in such cases, so that the defendant has had ample notice of the action brought against him and sufficient opportunity to appear in the High Court and defend the suit.

(1) *L. R.*, 6 Q. B., 155.

(2) 112 P. R., 1894 (P. C.).

Mr. Shadi Lal has relied also on the very recent decision of the King's Bench (Court of Appeal) in *Emanuel and others v. Symon* (1) to show that the defendant, though a British subject, cannot, for the purpose of applying to this case the principles enunciated in the authorities cited above, be said to be the subject of the sovereign of England where the judgment was obtained against him, as (according to the learned counsel) the sovereignty of His Majesty King Edward VII must, in this connection, be taken in the limited sense of being, together with both the Houses of Parliament, the supreme legislative authority only in what Dicey calls the "Law District of England." This argument, however, derives no support from the case cited, which simply decides that "neither the fact of possessing property situate in a foreign country nor the fact of entering into a contract of partnership in that country to deal with that property, is sufficient to give the Courts of the foreign country jurisdiction in an action *in personam* over a British subject, not resident in the foreign country at the date of the action, who has neither appeared to the process nor expressly agreed to submit to the jurisdiction of the foreign Court." In that case, the defendant, who at the time of the suit brought against him in the Supreme Court of Western Australia was neither resident nor domiciled in that colony, but was domiciled in England, was sued by certain plaintiffs claiming a decree for dissolution of a partnership entered into between the parties, while residing in Western Australia, for the purpose of working a gold mine situate there, and for sale of the mine and the taking of the partnership accounts. The writ issued by the Australian Court was served on the defendant in England, but he entered no appearance and did not defend the action. The suit was decreed by the Australian Court, and subsequently on the basis of that decree a suit was brought by the plaintiffs in England against the defendant. The Court of Appeal held that the Australian Court had, under the circumstances, no jurisdiction to pass a decree against the defendant. Lord Alverstone, L. C. J., after referring to and discussing the authorities I have already cited, says at p. 309:

"I think the conclusion from these authorities is that to make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction

(1) 1 King's Bench 302 (1908).

“ of that country, there must be something more than a
“ mere contract made, or the mere possession of a property in
“ the foreign country.”

From this passage it is clear that the learned Chief Justice did not consider the defendant in that case a subject of the colony of Western Australia, and therefore, held that, apart from other circumstances, the Supreme Court of that colony had no jurisdiction over him. But from this it does not follow that if, for instance, an action were brought in England against a British subject resident in Western Australia in respect of a contract which was to be performed in England and which had been broken there, and a judgment obtained from the English Courts, the Supreme Court of Western Australia would be justified in holding that the former Court had no jurisdiction over the defendant. And even if the Australian Court were justified in so holding, does it follow that the same rule of law applies to the case of the present defendant, who being a British subject domiciled in British India, is certainly in every sense of the term a subject of England? British India does not occupy a position similar to that of a self-governing British colony, and I do not think it can be argued that if an Australian, resident and domiciled in Australia, is not for purposes of the rule of law applicable a subject of England, a native of British India also enjoys a similar privilege of exemption from such allegiance. The two cases are not parallel, and cannot therefore be treated, in connection with the subject under consideration, as being on the same footing. The jurisdictional authority which English Courts can, it seems to me, exercise over British subjects resident abroad on the ground of their being such subjects, cannot also be exercised over them by the Courts of the British colonies or of Dependencies included in the British Empire, on the ground of their being subjects of the sovereign of England who rules over the whole Empire, and whose commands are supposed to be enforced by the said Courts.

On this point the observations of the learned Chief Justice of the Calcutta High Court in *Moazim Hussain Khan v. Raphael Robinson* ⁽¹⁾, a decision which is on all-fours with the present case, are of special importance. Referring to the contention of the counsel for the defendants in that case in

⁽¹⁾ I. L. R., XXVIII Cal., 641.

connection with the scope of Order XI, rule 1, the learned Chief Justice says :—

“ The appellants say that the object of service under that Order is not to give jurisdiction over the party served, but only to give him a notice of a proceeding affecting his rights, so as to give him an opportunity of coming in to defend them. This, no doubt, is so in the case of a foreigner, but is it so in the case of a subject of the British Crown resident outside the territorial jurisdiction of England, but in a dependency of the British Crown ? Though, no doubt, British India has its own Legislative Councils, the subjects of the British Crown there are subject to the Supreme Legislative authority of the Imperial Parliament, and Order XI, rule 1 (e), would appear to be general in its sphere of operation, excepting only Scotland and Ireland.”

“ In my opinion, the Order in question constitutes a Legislative Act of the sovereign power regulating the jurisdiction in the case of a British subject, resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects, assuming that the particular case falls within the Order.”

With these observations I am in entire agreement, and I think that they fully apply to and govern the present case.

Mr. Shadi Lal has, in the last resort appealed to the decision in *Kassim Mamoojee v. Isuf Mahomed Sulliman* ⁽¹⁾ as an authority in his favour, urging that it must be followed in preference to *Moazzim Hossein Khan v. Raphael Robinson* ⁽²⁾, which (he has contended) is an erroneous decision. But Maclean, C. J., who delivered the principal judgment in both the cases just cited, has pointed out at page 516 of the report in the later case the grounds of distinction between the two, which also effectually meet Mr. Shadi Lal's argument founded on the restricted signification, for purposes of Private International Law, of the words “ country ” and “ subject.” “ It is contended, however, for the plaintiff,” says the learned Chief Justice “ that without contesting the principles laid down in the cases I have referred to, and conceding that the judgments here are foreign judgments of a foreign Court, the defendant is not a foreigner within the meaning of the rule laid down in

(1) *I. L. R.*, XXIX Cal., 509.

(2) *I. L. R.*, XXVIII Cal., 641.

“ these cases, inasmuch as he is a native of British India, a
 “ subject of the sovereign both of the colony of Mauritius and of
 “ British India, and that the rule only applies to the case of
 “ foreigners, who owe neither obedience nor allegiance to the
 “ Power, the Courts of which have passed the judgment sued
 “ upon. There is, however, in this case nothing to show that
 “ any legislation exists of the sovereign power giving the Courts of
 “ Mauritius jurisdiction over a British subject, wherever he may
 “ be, and placing him under the jurisdiction of the Courts of
 “ Mauritius or at least making it compulsory for him to come
 “ and to submit to that jurisdiction. * * * * I
 “ think the defendant here was a foreigner within the meaning
 “ of that term as used in the case I have mentioned, other-
 “ wise the result would be that, upon a judgment obtained
 “ in a Court of any colony of the British Crown against an absent
 “ person who was not a native of, or either permanently or tem-
 “ porarily resident or domiciled within, that colony at the time
 “ of the suit or of the judgment passed against him *in absentem*,
 “ he might be successfully sued upon that judgment in any
 “ other Court within the British dominions. This view appears
 “ inconsistent with the decision in the case of *Turnbull v.*
 “ *Walker* (1). When Mr. Dicey in his work on “ conflict of
 “ Laws,” speaks of “ foreign” he means “ not English. ”

This passage is sufficient to show that the case with which the learned Chief Justice was then dealing was wholly different from Moazzim Hussain Khan's case, which lays down a principle quite in consonance with English authorities on the subject and fully applicable to the facts of the present case.

In connection with the question of jurisdiction, the appellant's counsel has further urged that the High Court in England had no power under Order XI, rule 1 (e), to grant leave for service of the writ of summons on the appellant in India, inasmuch as there was no breach in England of any contract which the appellant was bound to perform in that country. In support of this contention reliance has been placed upon Dicey's “ Conflict of Laws,” pages 234, 239 (illustration No. 15), and 240 (illustration No. 19). None of the cases cited by Dicey, however, applies to the facts of the present case. In *Hamilton v. Barr* (2), the decision rests on the ground that the wrongful dismissal of the plaintiff, in breach of contract, took place in the country where the

(1) 67 L. T. Reports, 767 (1892).

(2) 18 L. R., Ir. C. A. 297.

letter of dismissal was posted, namely in France. In *Holland v. Bennett* ⁽¹⁾ also the breach of contract, if any, took place at Naples, where the letter of dismissal was posted, and not in England. Both these decisions are, therefore, clearly distinguishable from this case in which there is no proof at all that the appellant posted in this country any letter to the respondent refusing to pay the amount due to the latter in respect of fees for work done and for money expended on behalf of the appellant in England. It can hardly be disputed that the money thus due to the respondent was payable to him in England, for, according to English law, it is the duty of the debtor to seek out his creditor and pay him wherever he may be, in all cases, where no particular place is named for payment. The leading authority on the point is *Robey v. The Snaffel Mining Co.* ⁽²⁾, the head note in which runs as follows :—

“In an application for service out of jurisdiction it appeared that the action was brought by the plaintiffs, engineers in England, for the price of machinery erected by them on the Isle of Man for the defendants, a Company carrying on business in the Island.

“There was no agreement as to the place of payment :—

“*Held* that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was, therefore, founded on a breach within the jurisdiction according to Order XI, rule 1 (e), and that service out of the jurisdiction might be allowed.”

The same rule was laid down in *Bell & Co. v. Antwerp, London and Brazil Line* ⁽³⁾, at page 107, where Lord Esher, M. R., says : “Where there is no place named for payment of a debt I think that the debtor is bound to pay the creditor on demand, though it is true that, where the contract does not make a demand previous to action a condition precedent, the creditor need not demand his debt otherwise than by bringing his action; he may in that case bring his action without previous demand, and say that the debtor owes him the money, and it is the duty of the debtor to come to him and pay the debt. Where

⁽¹⁾ 1 K. B. C. A. 867 (1902).

⁽²⁾ 20 Q. B. Division, 152.

⁽³⁾ 1 Q. B. 103 (1891).

“ the debtor is bound to pay his creditor on demand, the
“ creditor need not demand his debt at the debtor's place of
“ business or dwelling-house, or any particular place, he may
“ demand payment from his debtor wherever he may find
“ him. Wherever he finds the debtor and demands his
“ debt, the debtor is bound to pay him then and there ”.

To a similar effect is the decision in *Rein v. Stein* (1).

Looking, then, at the nature of the contract between the parties and the circumstances under which the money due by the defendant to the plaintiff was to be paid, I am clearly of opinion that the payment was to be made in England, and that the non-payment by the defendant was a breach within the jurisdiction of the contract which was to be performed in England. That being so, the High Court had power to allow service of the writ of summons on the defendant in India under Order XI, rule 1 (e), and the subsequent proceedings held in that Court were *intra vires*.

The next contention that has been raised for the appellant to show that the respondent's suit on the foreign judgment did not lie, is that the said judgment was not passed on the merits, and that, therefore, it cannot be enforced by the Indian Courts. In my opinion this contention has no force. The writ of summons issued by the High Court in England was, it is admitted, duly served on the appellant in this country, but the latter did not, within the time allowed for that purpose, enter an appearance and deliver a defence. The respondent had (under the rules of procedure that govern the Supreme Court) the right, at the expiration of the prescribed period, to enter final judgment for the amount claimed, with costs. The writ aforesaid was especially endorsed with the statement of claim, containing all the necessary particulars, and there is nothing to show that the application for leave to serve the writ was not supported by affidavit or other evidence stating the several particulars required by Order XI, rule 4. In short, the proceedings held in the High Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play; and the judgment passed against the defendant on the facts of the case must be considered as one passed on the merits. It does not proceed on any preliminary point, *i.e.*, a point collateral to the merits of the case, but is based

(1) 1 Q. B. 953 (1892).

on the merits as disclosed by the pleadings before the Court. If the defendant did not, in spite of notice of action, choose to appear and defend it, the judgment passed by the Court in plaintiff's favour was not the less a judgment on the merits, because it was not founded upon detailed evidence which the plaintiff might have produced had the defendant entered an appearance and contested the claim. The position to my mind is the same as if the defendant had appeared and confessed judgment. In support of his contention that the judgment in question cannot be considered as one passed on the merits, the appellant's counsel has relied on the following passage in Sir William Rattigan's *Private International Law* (1895) at pages 234—235.

"It would seem to be equally plain that, if, for instance, "it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrong-headedness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English Court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone to be incapable of receiving any effect in a British Court." The above passage does not, however, as I read it, support the present appellant's position, as it cannot, in my opinion, be affirmed in this case that the plaintiff has obtained judgment from the High Court in England "simply on the non-appearance of the defendant without adducing any evidence whatever in support of his claim." Under Order XI, rule 4, the plaintiff's application for leave to serve the writ of summons out of the jurisdiction must be supported by affidavit or other evidence, stating that the plaintiff has a good cause of action * * * * * and the grounds upon which the application is made, and leave can only be granted if the Court or Judge is satisfied that the case is a proper one for the service prayed for. The necessary procedure must be presumed to have been followed in this case, and it has not been shown by the appellant that it was not so followed. The affidavit filed by the present plaintiff-respondent in pursuance of the above rule, would, in my opinion, constitute "evidence in support of the claim" within the purview of the principle laid down in the passage quoted

above, and the judgment obtained after service of the writ on the defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits. If, however, the passage relied upon does not bear the construction I have placed upon it, if, that is to say, it means that there can be no judgment on the merits, unless, *after* the service of the writ on the defendant in the regular way, the plaintiff has adduced some evidence, oral or documentary, in support of his claim, such as he would have produced if the defendant had appeared and contested the claim, then, with all possible respect for the learned author of that passage, I venture to think that the rule laid down by him is expressed in too wide language, and I should be reluctant to follow it unless it were supported by clear authority. I can discover no such authority either in Dicey's "Conflict of Laws" (p. 411), or in any other standard text-book on the subject; and I do not think that the maxim enunciated by Sir William Rattigan himself as the one applicable in such cases, *viz.*, that the judgment passed must not contravene the fundamental principles of a rational system of law, supports the wide proposition, which it has been urged, is laid down in the passage quoted above.

I, therefore, think that the judgment in question must be considered as one passed on the merits and that (the Court which passed it having had jurisdiction over the defendant-appellant), it could be enforced by an action in this country.

The last contention urged by Mr. Shadi Lal is that the Divisional Judge was in error in decreeing the plaintiff's claim with interest at 6 *per cent.* on the amount due under the English judgment. This contention is, in my opinion, perfectly sound and must prevail. As has been pointed out in *Moazzim Hossein Khan v. Raphael Robinson* ⁽¹⁾, the English Statute as to judgments carrying interest does not apply to India, nor does a case of this kind fall within the scope of the Indian Enactment, XXXII of 1839. The whole object of the plaintiff's suit is to enforce the foreign judgment so as to recover from the defendant the amount due thereunder, and not to sue out execution of that judgment in the manner in which he would be able to proceed in the country in which the judgment was passed. He cannot, therefore, in a suit of this description recover more than appears on the face of the judgment, and it is not denied that the judgment sued upon is wholly silent about interest.

As a result of the above findings, I would accept this appeal so far as to reduce the amount decreed by the lower

(1) I. L. R., XXVIII Cal., 641.

Appellate Court to Rs. 1,810-9-0, which shall carry interest at 6 *per cent. per annum* from the date of the institution of suit to the date of realisation. I would allow the plaintiff proportionate costs throughout.

RATTIGAN, J.—The questions involved in this appeal have been so exhaustively discussed by my brother in the foregoing judgment that I need say no more than that I entirely agree with him upon all points. The order of this Court will be in the terms suggested by him. 8th March 1909.

Full Bench.

No. 76.

*Before Mr. Justice Reid, Chief Judge, Mr. Justice Robertson,
Mr. Justice Kensington, Mr. Justice Johnstone, Mr. Justice
Rattigan, Mr. Justice Shah Din.*

HAJI MUHAMMAD BAKHSH,—PLAINTIFF,

Versus

BHAGWAN DAS,—DEFENDANT.

Civil Reference No. 29 of 1908.

} REFERENCE SIDE.

Jurisdiction—Civil or Revenue Court—Plea raised by defendant in Civil Court in respect of which a suit could be brought in Revenue Court—Suit against person in possession of occupancy rights under decree of Civil Court—Punjab Tenancy Act (XVI of 1887), section 77 (3) and (3) (h).

A, an occupancy tenant, mortgaged his occupancy rights in February 1905 to B, one of the landlords. Subsequently, A sold his occupancy rights to another landlord C, and in June 1905 C sued B for possession by redemption. In this suit B pleaded that the sale to C was invalid under the provisions of the Tenancy Act, which plea the Court held, it could not take cognisance of and decreed redemption on the 9th August, 1905. On the 4th August, 1905, B brought a suit in the Revenue Court to have the sale set aside, and this was decreed on the 13th January, 1906. In June, 1906, C applied for execution of his decree, and was in due course put in possession of the land, B's objection being overruled.

B now sues C for possession on the ground that as the sale to Chad been set aside by competent authority (i.e., the Revenue Court) he was not entitled to oust B, the plaintiff. The Divisional Judge was of opinion that the suit fell under section 77 (3) (h) of the Punjab Tenancy Act, 1887, and was cognisable by a Revenue Court only.

Held, by a Division Bench (Robertson and Rattigan, JJ.) that as the sale had been definitely set aside by the Revenue Court, and defendant was, therefore, unable to rely upon it, no question could arise as to the validity or otherwise of the transfer in favour of defendant, and the only point in issue was, whether one of two landlords could recover possession of land, from which the other landlord had ousted him, and the suit was, therefore, cognisable by a Civil Court.

Held by the Full Bench (Robertson, J., dissenting), following *Asa Nand v. Kura* ⁽¹⁾ and *Fakiria v. Dhani Nath* ⁽²⁾ that no plea raised by a defendant, in reply to a civil claim, can be entertained or taken cognisance of by a Civil Court (even incidentally), if that plea relates to any matter in respect of which such defendant would be entitled to bring a suit in a Revenue Court (*vide* section 77 (3) of the Punjab Tenancy Act, 1887), and that such pleas must be entirely ignored by a Civil Court, even if they go to the very root of the case.

Case referred under section 100 of the Punjab Tenancy Act, 1887, by Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, on 23rd March, 1908.

Roshan Lal, for defendant.

Order referring case to a Division Bench by:—

10th June 1905.

CHATTERJI, J.—I am inclined to agree with the learned Divisional Judge, that ordinarily this suit would fall within section 77 (3) (h) of the Punjab Tenancy Act. That section covers all suits in which the landlord calls in question the validity of a transfer of a right of occupancy whether the suit is in form merely declaratory or is to dispossess the transferee—*Gurdial v. Farida* ⁽³⁾. The sale, however, has been set aside, and a similar declaration can hardly be claimed again. Is not the defendant's possession now simply that of one of the landlords who has managed to get possession of the common tenant's holding, possibly wrongfully, as the sale has been set aside by a subsequent decree of the Revenue Court, and is the plaintiff entitled now to dispossess him through the Revenue Court? A question arises as to whether one landlord can dispossess another in these circumstances without partition, but this is a matter relating to the merits, which apparently has not been raised in the lower Court. But the question still remains—Can the suit lie in the Revenue Court in these circumstances?

I think the learned Divisional Judge's opinion that there was no cause of action for possession at the time of the former revenue suit, and that it has now arisen, is beside

⁽¹⁾ 11 P. R., 1895, F. B.

⁽²⁾ 24 P. R., 1907.

⁽³⁾ 88 P. R., 1894.

the point, as the Civil Court cannot discuss it being one relating to the merits of a revenue suit.

I think the point referred is not free from difficulty and refer it to a Bench.

The order of the Division Bench (Robertson and Rattigan, JJ.) was delivered by :—

RATTIGAN, J.—This is a reference under section 100 of the Punjab Tenancy Act, 1887, and illustrates in a very marked degree the anomalies and hardships which not infrequently ensue in cases in which questions which are cognisable, partly by the Civil Courts and partly by the Revenue Courts, are involved. 3rd Novr. 1908.

The facts are as follows :—One Tabu, an occupancy tenant mortgaged his occupancy rights in February 1905 to Muhammad Bakhsh, one of the landlords. Subsequently, Tabu sold his occupancy rights to another landlord, Bhagwan Das, and in June, 1905, the latter sued Muhammad Bakhsh for possession, by redemption, of the land mortgaged to him.

To this suit Muhammad Bakhsh pleaded that the sale to Bhagwan Das was invalid under the provisions of the Tenancy Act, but the Court, acting in accordance with the principle enunciated in the Full Bench ruling reported as *Asa Nand v. Kura* (1), held that it could not take cognisance of such a plea, and that, as there was no other defence to the claim, it must pass a decree for redemption in favour of the plaintiff Bhagwan Das.

This decree was passed on the 9th August, 1905. On the 4th August, 1905, Muhammad Bakhsh brought a suit in the Revenue Court to have the sale in favour of Bhagwan Das set aside, and on the 13th January, 1906, the Revenue Court granted Muhammad Bakhsh a decree in the terms prayed for. At this time, therefore, there were two entirely antagonistic decrees in force. Bhagwan Das, upon the strength of the sale in his favour, had obtained a decree from the Civil Court for redemption of the mortgage in favour of Muhammad Bakhsh. On the other hand, Muhammad Bakhsh had, subsequently, obtained a decree from the Revenue Court, setting aside the sale in favour of Bhagwan Das.

In June, 1906, Bhagwan Das applied for execution of the decree in his favour, and was, in due course, put in possession of the land, Muhammad Bakhsh's objection being over-ruled.

(1) 11 P. R., 1895.

Muhammad Bakhsh now sues Bhagwan Das for possession of the land on the ground that, as the sale in the latter's favour had been set aside by the competent authority (that is, the Revenue Court), he was not entitled to oust the present plaintiff.

The Munsif decreed the claim, but on defendant's appeal the learned Divisional Judge was of opinion that the suit fell within the purview of section 77 (3) (h) of the Punjab Tenancy Act, and he has, accordingly, referred the question whether the suit is or is not cognizable by a Civil Court, to this Court for determination.

In our opinion the suit is clearly one cognizable by a Civil Court.

The sale in favour of the defendant has been definitely set aside already by the Revenue Court, and the defendant is, therefore, unable now to rely upon it. No question can, in the circumstances, arise as to the validity or otherwise of the transfer in favour of the defendant, and the only point in issue is whether one of two landlords can recover possession of land from which the other landlord has ousted him. As both plaintiff and defendant are landlords, and the land belonged to a common tenant, it may well be a question whether the present suit will lie so long as no partition takes place, but the question involved is one for a Civil and not a Revenue Court to decide. We agree with the learned Divisional Judge that section 244, Civil Procedure Code, is no bar to the present suit. Whatever may be the effect of the decree of the Revenue Court, the decree for redemption has not been and could not be thereby set aside.

Before concluding we would, with all due deference, venture to express a doubt as to the correctness of the doctrine that in cases such as this where a defendant, in answer to the plaintiff's prayer, raises a plea which goes to the very root of the case, a Civil Court ought to simply ignore that plea if it relates to matters in respect of which a Revenue Court is alone competent to finally adjudicate.

In the present case when Bhagwan Das originally sued for redemption of the land, Muhammad Bakhsh pleaded that the sale in favour of Bhagwan Das was invalid. This plea obviously went to the very root of the dispute. If it succeeded, plaintiff's case must necessarily have failed, whereas if it did not succeed, plaintiff, as there was no other defence,

must have won his case. We admit that the Civil Court could not give a final decision upon the point as the only Court competent to determine it was a Revenue Court.

But we do not think that a plea of this kind should be utterly ignored and brushed aside by the Civil Court. That Court should, we think, adopt one or other of two courses. It should either hold that the case is one beyond its jurisdiction inasmuch as it cannot adjudicate upon the really essential issue between the parties, and should, therefore, return the plaint to the plaintiff with a recommendation that it should be presented to the Revenue Court, with such amendment as may be necessary, or it should act as a Court of Small Causes often has to act, and for the purposes of the suit before it, decide, incidentally, matters upon which it can give no final decision (see as to this *Rajendra Mullick v. Nanda Lall Gupta* ⁽¹⁾, *Miraj-ul-din v. Karim Bakhsh* ⁽²⁾). Presumably its decision upon such matters will, in the majority of cases, be found to agree with the decision therein, which a Revenue Court may thereafter give, but even if the case be otherwise, the person against whom the Civil Court has, upon its view of the law and facts, given a decree, would be entitled, if the Revenue Court subsequently decided in his favour, to apply for a review of judgment. As things at present stand, the Civil Court is placed in the very invidious position of deciding a case of this kind simply and solely upon the plaintiff's statement of facts, and is bound to ignore the defendant's plea, an anomalous and unreasonable mockery of justice which obviously can in no case satisfy the defendant, who is certain to have recourse to the Revenue Court. He may, no doubt, equally have recourse to the latter Court in those cases in which the Civil Court has incidentally decided the plea raised by him, but we certainly think that the chances of litigation being thus prolonged will be considerably curtailed if the parties know that the real point at issue between them has been duly considered by an independent tribunal and not simply brushed aside.

The argument *ab inconvenienti*, therefore, upon which the decision in *Ghanaya v. Basan Mal* ⁽³⁾ and also to some extent the decision of the Full Bench in *Asa Nand v. Kura* ⁽⁴⁾ would seem to have been based, does not, if we may with all respect say so, appear to have much force. If, however, it is to be

(1) *I. L. R.*, XXXI Cal., 1001. *F. B.* (3) 96 *P. R.*, 1894.

(2) 43 *P. R.*, 1902.

(4) 11 *P. R.*, 1895, *F. B.*

held that the words in section 77 (3) of the Punjab Tenancy Act, 1887, "shall not take cognizance of any dispute or matter" preclude a Civil Court in cases of this kind from determining, even incidentally, a plea by the defendant which relates to such matters, we are ourselves strongly of opinion that the one and only course for the Civil Court to adopt, is to stay its hands and to refuse to adjudicate in a suit in which it has jurisdiction merely to entertain the pleas of the plaintiff, and in which it must, perforce, decide the case on those pleas and without reference to the pleas of the defendant. To our minds it is nothing short of a travesty of justice that a Court should be compelled to grant plaintiff a decree because the pleas urged by the defendant, though they go to the very root of the case, relate to matters upon which the Civil Court can give no final decision. In such a case it is surely far better that the Civil Court should refuse to exercise jurisdiction and leave the parties to fight out their dispute in the only Court which can effectually adjudicate thereon. If this course is adopted one or other of the parties will, in all probability, proceed to the Revenue Courts, and the issue between them will in due course be duly determined once and for all, and the Civil Courts will thus be relieved from the burden of hearing cases in which their decision must necessarily, in the main, prove infructuous and their time and trouble be wasted. It is for this reason and because the question involved appears to us to be for this and other reasons, one of considerable importance that we venture, with every deference, to demur to the correctness of the rule laid down by the Full Bench in *Asa Nand v. Kura* ⁽¹⁾ and subsequently followed in *Fakiria v. Dhani Nath* ⁽²⁾. We accordingly refer the matter to the determination of the Full Court.

The question referred is whether in cases in which the plea urged by the defendant goes to the root of the case, but relates to matters in respect of which a Civil Court can give no final decision, the procedure laid down by the Full Bench in the ruling above cited is correct, or if not, what course should be adopted by the Civil Court. This question, it is true, does not actually arise at the present stage of the case before us, but it arose at an earlier stage, and it is because we think that, if the Civil Court had not been obliged to

(1) 11 P. R., 1895, F. B.

(2) 24 P. R., 1907.

follow the Full Bench ruling, this litigation would long since have terminated, that we deem it right to have the question definitely settled, for the guidance of the Courts in future.

ORDERS OF THE FULL COURT.

RATTIGAN, J.—Briefly stated, the question referred to the Full Court is, whether the decisions of the Full Bench reported as *Asa Nand v. Kura* ⁽¹⁾ and of the Division Bench reported as *Fakiria v. Dhani Nath* ⁽²⁾ are correct, and if not, what should be the procedure of a Civil Court when, in answer to a claim determinable by that Court, the defendant urges a plea which relates to matters or disputes of which the Civil Court cannot take cognizance, under the provisions of section 77 (3) of the Punjab Tenancy Act, 1887. 4th Feby 1909.

I confess that it is with much doubt that I proceed to give my opinion upon this question. I was one of the two Judges who referred it to the Full Court, and I am still of opinion that very great hardship and injustice will at times ensue if we accept the principle laid down in the rulings above cited. It seems to me, and I say it with the utmost respect that it is in the highest degree anomalous that a Civil Court should be compelled to decide a suit upon a one-sided view of the case, and that it should be debarred from entertaining a plea by a defendant, which would, if established, result in the dismissal of the claim. For example, if upon the facts of the case in *Fakiria v. Dhani Nath* ⁽²⁾, the defendants had been able to satisfy the Court that they were occupancy tenants and as such entitled to cut down the trees in question, plaintiff's claim for damages must necessarily have failed. In that particular case it may be that the defendants were not entitled to occupancy rights, but with that fortuitous circumstance I am not now concerned. I take the hypothetical case that the defendants would be in the position of proving their plea, if they were allowed the opportunity of doing so. But, according to the rulings under consideration, the Civil Court must in every case of the kind ignore the defendant's plea, and as there is and can be, no other defence, must perforce give plaintiff the decree for which he prays, and this too, though in point of law, and it may be also of equity, he is not entitled to any relief. This is a very extraordinary and unsatisfactory state of things, and I do not think that the referring order goes

(¹) 11 P. R., 1895.

(²) 24 P. R., 1907.

too far when it describes a decision given in such circumstances as a mere travesty of justice. But while this is still my opinion, I am after further consideration reluctantly compelled to admit that, as the law stands, the Civil Court has no option but to entirely disregard any such plea on the part of a defendant.

It has been suggested that the words "and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted" in section 77 (3) of the Punjab Tenancy Act must be taken to refer to the allegations or pleas of the plaintiff alone and should not be held to include pleas by the defendant.

The suggestion is ingenious, but I am sorry to say, in my opinion, quite untenable. The words of the sub-section are exceedingly wide and admittedly would cover pleas by the defendant, and, I regret, I cannot agree that they do not in the clearest and most unequivocal manner include the latter. I admit that the Civil Courts have plenary jurisdiction and that their jurisdiction in any particular matter cannot be regarded as ousted, unless the Legislature has in unmistakable language, taken away that jurisdiction.

This is a well established proposition for which no authority need be cited. But in the present case I must concede that the language of clause (3) of section 77 of the Act is beyond all doubt. The clause begins by stating that suits of a certain kind shall be instituted in, and heard and determined by, Revenue Courts. Obviously this refers to the plaintiff's part of the case. It then goes on to enact that no other Court shall take cognizance of any dispute or matter with respect to which such suits might be instituted in a Revenue Court. I find it impossible to interpret these words in the manner suggested, on the contrary, they seem to me (after full consideration) to cover, as clearly as words can, pleas by a defendant which relate to matters in respect of which such defendant might bring a suit in a Revenue Court, if he so desired. In other words, no plea raised by a defendant in reply to a civil claim can be entertained or taken cognizance of by a Civil Court if that plea relates to any matter in respect of which such defendant would be entitled to bring a suit in a Revenue Court. It is for the same reason that I am obliged upon reflection to hold that a Civil Court cannot decide such pleas, even incidentally, and merely for the purposes of the suit before it. The clause

distinctly states that it "*shall not take cognizance*" of any such dispute or matter, and in this respect the analogy of the jurisdiction of a Small Cause Court to incidentally decide matters upon which it has no jurisdiction to give a final decision, is not in point. A Small Cause Court for instance, can, in a case where a plaintiff claims house rent, incidentally decide whether or not he is the owner of the house, though it has no power to decide a suit in which the plaintiff claims to be the owner of the house.

The distinction between the two cases is this, that in the case of the Small Cause Court its jurisdiction is ousted only in respect of claims put forward by a plaintiff, but even in those cases, where it would have no jurisdiction to take cognizance of a particular suit, its jurisdiction to take cognizance of a plea by defendant which relates to matters in respect of which such suit might be instituted, is not in express terms taken away by the Legislature. On the other hand, the jurisdiction of the Civil Court under section 77 (3) of the Punjab Tenancy Act is far more strictly limited, for it is debarred from taking cognizance not only of any such suit, but also of any matter or dispute with respect to which such suit might have been instituted.

Another suggestion, which at first sight appeared to me plausible is that in cases of this kind the Civil Court might justifiably hold that, as it had power to deal only with plaintiff's version of the case and had no jurisdiction to take cognizance of defendant's plea if it related to "matters or disputes" within the meaning of section 77 (3) of the said Act, the proper course for it to adopt would be either to dismiss the claim as one which involved, and essentially involved, matters beyond the competency of the Court to take cognizance of, or, at all events, to stay proceedings until the proper Court had determined those matters. I confess that at one time I was inclined to adopt this suggestion in order to enable the Court to avoid doing what may in many instances be grave injustice, I was then and am still, most reluctant to hold that a Civil Court of Justice should ignore the defence set up by the opposite party, especially in those cases in which that defence, if established, would effectually demolish the plaintiff's allegations.

Upon reflection, however, I am unable to accept this solution of the difficulty, and for the simple reason that, if it were

adopted, it would in many cases involve the greatest hardship and injustice to a plaintiff. To take, for example, once more the facts of *Fakiria v. Dhani Nath* (1). Plaintiff claims Rs. 5 as damages from defendant, who has cut down a certain tree on land admittedly belonging to plaintiff. Plaintiff alleges that defendant is a mere trespasser. Defendant in reply asserts that he is an occupancy tenant and as such entitled to cut down the tree. If the Civil Court declines to entertain the claim because it cannot take cognizance of defendant's plea, what will be the result? Plaintiff cannot seek the intervention of the Revenue Courts, for he does not admit that there is any relationship of landlord and tenant existing between him and defendant, and defendant naturally will not come to the help of plaintiff by asking the Revenue Courts to hold that he has occupancy rights. In a case where defendant's plea is false, this will *a fortiori* be the result, and it will thus be open to a defendant to effectually block any suit of this kind by putting forward (whether honestly or fraudulently) a plea which relates to matters of which the Civil Court has not the right to take cognizance. There are thus grave difficulties on all sides, and loth as I am to hold that a Civil Court must in cases of this nature ignore pleas by a defendant which may be true and may afford a good and effective answer to plaintiff's claim, I am constrained to hold that as the law stands, such pleas, if they fall within the purview of section 77 (3) of the Panjab Tenancy Act, 1887, must be set aside by the Civil Court. Hard cases make bad law, and if we try to avoid the possibility of injustice in some cases where the terms of the law are clear, we may fall into the very serious error of legislating instead of interpreting the law as we find it. "*Incidit in Scyllam qui vult vitare charybdim.*"

I think we should be well advised, therefore, in adhering to the plain terms of the law, even at the risk of possible injustice to particular litigants. For this a Court of law is not responsible, and the utmost that we can do is to point out that in some cases a strict adherence to the terms of section 77 (3) of the Act may result in great hardship to a defendant whose perfectly genuine and valid plea would, if it could be considered, put the plaintiff at once out of Court, but against whom a decree has to be given for the sole reason, that that plea is one not entertainable by the Civil Court.

(1) 24 P. R., 1907.

In this connection I might refer to another aspect of the question. It is argued that the words of clause (3) of section 77 of the Act are exceedingly wide and general, and that it would not be open to a defendant to urge in bar of the plaintiff's suit even a decree obtained by him in the Revenue Courts giving him the *status* claimed by him. For example, if in the case referred to, the defendant had pleaded that he had been adjudged an occupancy tenant by the Revenue Court, the contention is that the Civil Court could not take cognizance even of that plea, inasmuch as it related to a matter with respect to which a suit could be instituted in a Revenue Court. I do not myself attach much weight to this argument, for it seems to me that once the defendant has sued and obtained a decree in the Revenue Court with respect to the matter pleaded by him in reply to plaintiff's claim, it is impossible to contend that the matter so pleaded is one with respect to which a suit might be instituted in the Revenue Courts.

Those Courts have already adjudicated upon that matter and consequently no other suit could legally be instituted in them with regard to it.

It is with great reluctance that, I am compelled to hold, that the procedure prescribed in the cases cited at the commencement of my opinion is in accordance with law and should be followed. But despite the hardships and injustice that may occasionally ensue from adherence to that procedure, I am bound to hold that as the law stands, it must be followed.

REID, C. J.—I concur in the conclusion arrived at by my brother Rattigan, and in the reasons recorded for that conclusion. Any assistance which arguments to the contrary might derive from *Vinayak Gangadhar Bhat v. Krishnarao Sauharam Adhikari* (1), and *Amrita Lal Kalay v. Niharan Chandra Nayek* (2) has been disposed of by that part of my brother's judgment which deals with the distinction between the jurisdiction of Small Cause and Revenue Courts.

I would only add that where a Revenue Court has finally decided the *status* of the parties mere denial that the point has been decided, or allegation that the decision was erroneous does not, in my opinion, constitute "a dispute or matter with respect to which" any suit specified in section 77 (3) of the Tenancy Act "might be instituted", so as to

(1) *I. L. R.*, XXV Bom., 625.

(2) *I. L. R.*, XXXI Cal., 340.

debar a Civil Court from taking cognizance of the decision and proceeding with the suit for damages, etc., before it on the basis of that decision, a suit barred by the rule of *res judicata* not being in my opinion, a suit which may be instituted, within the terms of the sub-section.

13th April 1909. KENSINGTON, J.—I concur in the view taken by my learned brother Rattigan, and on consideration do not desire to add to what he has said.

16th April 1909. ROBERTSON, J.—I agree with the arguments put forward by the learned Chief Judge and my brother Rattigan, and if I have come to a different conclusion I can put my reason into very few words. It is absolutely essential to the administration of justice that a defendant in a civil suit should be able to put forward any defence which would be a good answer to the claim, and that the Court which has jurisdiction to hear and decide the suit should be able to frame and try any issue for the purposes of that suit which may be necessary to its proper disposal. If this right is withheld, we have, as my brother Rattigan points out, a mere travesty of justice. Consequently I hold that we should not put any construction upon any clause in any Statute which takes away such an elemental right unless there is absolutely no alternative.

Inference, however strong, would not be enough. Indeed for myself I may almost go as far as to say that I should not interpret any Statute to deprive a party to a suit from having his valid pleas decided on, unless such Statute in specific words interdicted the entertainment of such *plea as a plea*. Strong and cogent as the arguments of my learned brethren are, I am unable to hold that the words "and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted" are sufficiently plain to override a right necessary to the very existence of a Court of Justice, if it is to be a Court of Justice at all. I hold, therefore, that it is competent to a Civil Court to decide, solely for the purposes of that suit and with no binding force beyond the purview of that suit no doubt, any issue which is necessary to the disposal of the suit itself, and that the words of section 77 (3) of the Tenancy Act are not sufficient to justify that denial of justice which the present interpretation requires. I must admit fully that it is only upon this broad general ground that this view can be supported.

Upon the narrower basis of interpretation the views expressed by my learned colleagues are unanswerable.

JOHNSTONE, J.—I agree entirely in the views so clearly and lucidly expressed by the learned Chief Judge and my brother Rattigan, and I have only a few supplementary observations to make.

In the early days of British rule in the Punjab there was no clear distinction between Civil and Revenue jurisdiction. When the distinction became established and the Civil Courts came under the control and supervision of a purely judicial supreme authority, the idea grew up that many matters connected with land, and especially matters between the landlord and Government's peculiar *protégé*, the occupancy tenant, could not safely be left to be dealt with by those Courts, which were for many years not remarkable for efficiency. It was feared that law administered in a pedantic spirit by unsympathetic Courts, officered by men who might perhaps be unacquainted with the conditions of agricultural life, would cause bad feeling and work practical injustice, and thus the process began of excluding from the jurisdiction of the Civil Courts many matters of an essentially judicial (as distinguished from an executive) character, with the result that two sets of judicial tribunals came into existence, each set being subject to a different supreme authority. Whether in the actual circumstances of the Province, this arrangement was wise or not, is a question upon which opinions may differ, but there can be no doubt that certain drawbacks attach to it. There are many branches of law which both sets of Courts have to deal with and to interpret; for example, the law of evidence generally, estoppel, *res judicata*, limitation of suits, appeals and applications, acquiescence, waiver, and the many problems of Civil Procedure. One may say without fear of contradiction that it is undesirable that the law in connection with such things should be laid down independently by two sets of Courts in the same country, each subject to a separate supreme authority. Conflicting decisions by these authorities must cause uncertainty in the minds of the public, and I suppose there are few greater faults in any system of legal administration than the production in the public mind of uncertainty as to what the law is.

However this may be, the arrangement was established, and when in 1887 the Land Revenue and Tenancy Acts came up to be re-enacted, the opportunity of pursuing the crusade against the Civil Courts was too good to be lost, and the result was section 158, Punjab Land Revenue Act, 1887,

and section 77, Punjab Tenancy Act, 1887. I have little doubt myself that the wish of some, at least, of those responsible for these Acts, when section 77 (3) of the Tenancy Act, came to be shaped, was that when in any suit any question between landlord and tenant came into issue, that suit should be heard in a Revenue Court. That was an intelligible position, but the Legislature, whose intentions can be gauged solely by the actual wording of the sub section, did not take up that position. The jurisdiction of the Civil Courts can be ousted only by express words. If a plaint states facts and discloses a cause of action, which do not come within the scope of any clause of section 77 (3) aforesaid, the Civil Court has jurisdiction over that *suit*. If the defence put in cannot be brought within any of those clauses, it is all plain sailing and the whole case can be taken cognizance of by a Civil Court. If, however, the defence raises a question of the kind covered by any of those clauses, *that matter* cannot be taken cognizance of by a Civil Court. The jurisdiction of that Court to hear and determine the suit is not expressly ousted, and the result is as laid down in *Fakiria v. Dhani Náth*. ⁽¹⁾

I entirely agree with my brother Rattigan that this conclusion is anomalous, but there is no help for it apart from amendment of the law. The answer to the reference should be that *Fakiria v. Dhani Nath* ⁽¹⁾ is correct and should be followed.

Papers should now be returned to the Divisional Judge, Hoshiarpur.

20th April 1909.

SHAH DIN, J.—For the reasons so lucidly recorded by my brother Rattigan, I concur in the answer which has been given by him to the reference.

⁽¹⁾ 24 P. R., 1907.

No. 77.

Before Mr. Justice Reid, Chief Judge, and Mr. Justice Robertson.

RAM LABHAYA, &C.,—(PLAINTIFFS),—PETITIONERS,

Versus

BISHAN DAS, &C.,—(DEFENDANTS),—RESPONDENTS.

REVISION SIDE.

Civil Revision No. 2518 of 1908.

Revision under section 70 (1) (a), Punjab Courts Act—Power of Chief Court to revise orders although they might be attacked on appeal from the decree—Civil Procedure Code (1882), section 588—Jurisdiction of Court in suits for damages for torts—Meaning of words “actually and voluntarily resides”—Civil Procedure Code (1882), sections 17 and 18.

The plaintiffs brought a suit to recover compensation in the District Court of the Gujrat District on the allegation that the defendants had murdered a near relative of plaintiffs in the Faridkot State; where they were convicted and sentenced to imprisonment for life. The District Court held that the cause of action having arisen in the Faridkot State, the plaintiffs should institute their suit in that State. This order was upheld by the Divisional Judge on appeal. The Chief Court on revision under section 70 (1) (a) of the Punjab Courts Act,

Held, following *Pandit Ram Kant v. Pandit Rag Deo* (1) and *Asa Ram v. Tara Chand* (2) that a revision lies to the Chief Court under section 70 (a) of the Punjab Courts Act from orders appealable under section 588 of the Civil Procedure Code (1882), in spite of the clause to that section to the effect that orders passed in appeals under the section shall be final.

Held, also, that the defendants although in confinement in jail in the Faridkot State were still for the purposes of section 17 of the Civil Procedure Code (1882) “actually”, and “voluntarily residing” in the Gujrat district where their homes and land are and where their families reside, and that therefore the Gujrat Court had jurisdiction to try the case.

Petition for revision of the order of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 10th day of July 1908.

Sukh Dial, for petitioners.

Nanak Chand, for respondent.

The judgment of the Court was delivered by

REID, C. J.—The first question for consideration is whether 24th April 1909. revision lies, in spite of the clause in section 588 of the

(1) 60 P. R., 1897, F. B.

(2) 44 P. R., 1899.

late Code of Civil Procedure that orders passed in appeals under the section shall be final.

Pandit Ram Kant v. Pandit Rag Deo ⁽¹⁾ and *Asa Ram v. Tara Chand* ⁽²⁾ are authority for holding that revision does lie.

We concur in the *dictum* at page 265 of the report of the former authority, that the power of revision is intended to remedy grave injustice, and that the exercise thereof is not to be refused merely because an appeal may eventually lie from the decree in the suit.

To refuse the petitioners a remedy by suit in a Court which has jurisdiction would, in this case, constitute grave injustice, and we are, in our opinion, forced to consider whether the Gujrat Court has jurisdiction.

The house of the defendants-respondents, is admittedly in the Gujrat district, they own land there and their families reside there.

They are temporarily confined in the Faridkot State, under sentence of imprisonment for life, for murder, but it has not been shown that under the rules regulating sentences of imprisonment in the Faridkot State, imprisonment for life is not, as in this province, imprisonment for a definite term of years, which may be abbreviated by good conduct-marks, and we are unable to hold that the respondents reside permanently in the Faridkot State. *Prem Singh v. Jawand Singh* ⁽³⁾ is directly in point. Therein it was held that confinement in a jail within the jurisdiction of one Court did not cause the defendant to lose his "village residence" within the jurisdiction of another Court. It is true that that ruling was under section 8 of Act XI of 1865, and that *Kashee Nath Kooer v. Deb Kristo Ramanooj Dass* ⁽⁴⁾, in which it was held that whatever the purpose for which a man may go to another jurisdiction than that in which his family resides, if there is *animus revertendi*, the family dwelling-house must be considered to be his dwelling place, was under section 5, Act VIII of 1859, but the criterion of jurisdiction was under each section, the defendants' "dwelling" within the jurisdiction—*Sophia Orde v. Alexander Skinner* ⁽⁵⁾ is also in point. In section 18 of the Code of 1882 the word

⁽¹⁾ 60 P. R., 1897, F. B.

⁽²⁾ 44 P. R., 1899.

⁽⁵⁾ I. L. R., VII All., 91 P. C.

⁽³⁾ 85 P. R., 1875.

⁽⁴⁾ XVI W. R., 240.

used is "reside", and the words used in section 17 are "actually and voluntarily reside". The defendants are certainly not "voluntarily residing" in the Faridkot State.

Counsel for the defendants-respondents has contended that the word "actually" is in his favour, but we are unable to accept this contention. The words "actually" and "voluntarily" must be taken together, and we understand the word "actually" to mean "in fact." We have no hesitation in holding that the residence of each defendant is in fact within the jurisdiction of the Gujrat Court and that that is the voluntary residence of each defendant.

The Gujrat Court has, therefore, jurisdiction.

The application is allowed, the order returning the plaint for presentation in another Court is set aside and the record is returned to the Court of the District Judge for disposal, in accordance with law, of the application for setting aside the *ex parte* decree.

Costs of this and of the lower Appellate Court will be costs in the cause.

Revision allowed.

No. 78.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

LALA NAR SINGH DAS,—(DEFENDANT),—PETITIONER,

Versus

HAKIM GHULAM NABI,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 2087 of 1908.

} REVISION SIDE.

Pre-emption—Punjab Act II of 1905—Court's power to extend the time fixed under section 19.

Held, that under section 19 of the Punjab Pre-emption Act, 1905, the Court has power to extend the period originally fixed by it, even after expiry of that period. Provided (1) that the Court should not extend the period save for good and sufficient reason; and (2) that in any event the extension of the period cannot, in certain cases, suffice to bring a claim within limitation when it would, save for such extension, have been barred by limitation.

Petition for revision of the order of Rai Sahib Bhagat Narayan Das, District Judge, Lahore, dated the 23rd May 1908.

Dhanpat Rai, for petitioner.

Shadi Lal, for respondent.

The judgment of the Court was delivered by

7th April 1909.

RATTIGAN, J.—The question involved in this petition and in Civil Revisions Nos. 2038 of 1908 and 2089 of 1908 and also in Civil Reference No. 54 of 1908, is to all intents and purposes the same, and in this judgment we will dispose of all these petitions and the said order of reference.

Mr. Dhanpat Rai on behalf of the petitioners in the revision cases desired to enter into the facts and merits of the particular cases, but quite apart from the objection that no exception was taken on those grounds, to the orders of the lower Court in the petitions for revision, we see no reason whatever to interfere with the exercise of a discretionary power by a lower Court, if in point of law that Court has the right to exercise such power. Assuming for the moment that the Court had such power, we are satisfied that its discretion was exercised in a reasonable manner and that we should not be justified in interfering on revision, with its orders. The sole question, therefore, before us is whether it is open to a Court after it has once fixed a time under section 19 (1) of the Pre-emption Act (Punjab), 1905, to enlarge that time by a subsequent order. After careful and full consideration of the arguments addressed to us by the learned counsel who have appeared before us, we have no hesitation in holding that it was not the intention of the Legislature that the fixing of the period for the purposes of section 19 of the Act, should be like the laws of the Medes and Persians, immutable and not open to reconsideration.

The third clause of section 19 of the Act, no doubt, provides that "if the plaintiff fails within the time fixed by the Court "to make the deposit or furnish the security mentioned in "sub-section (1), his plaint shall be rejected." In one sense this provision may be regarded as mandatory, for if, within the time fixed by the Court, the plaintiff fails to comply with its order, and the Court does not think fit to enlarge the time, the Court must reject the plaint. But we cannot read this provision as mandatory in the sense contended for by Mr. Dhanpat Rai, that is to say, that the Court must once and for all fix the time within which its order is to be obeyed, and that it has no power thereafter to extend the said time.

It seems to us that section 19 (3) of the Punjab Pre-emption Act, 1905, is, in a sense, supplementary to section 54 of the Civil Procedure Code, 1882, just as section 16 A of the

Punjab Laws Act, 1872, was held to be supplementary thereto (see *Chanda Singh v. Ishar Singh* (1)).

In connection with this question Mr. Shadi Lal has referred us to the provisions of sections 54, 549 and 602 of the Civil Procedure Code of 1882, which in terms appear to be equally mandatory. Thus section 54 of that Code provides that the *plaint shall be rejected in the following cases* :—

“(a) if the relief sought is undervalued and the plaintiff,
“on being required by the Court to correct the
“valuation within a time to be fixed by the Court,
“fails to do so ;

“(b) if the relief sought is properly valued, but the
“plaint is written upon paper insufficiently
“stamped, and the plaintiff, on being required
“by the Court to supply the requisite stamp-paper
“within a time to be fixed by the Court, fails to do
“so ;

“(c)

“(d) if the plaint having been returned for amendment
“within a time fixed by the Court, is not amended
“within such time.”

So again, section 549 of that Code provides that, “if such security be not furnished within such time as the Court orders, the Court shall reject such appeal.” Lastly (and this is, perhaps, the strongest case) section 602 of the Code of 1882 enacted that the applicant for a certificate of appeal to the Privy Council, “shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date,—(a) give security for the costs of the respondent, and (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to Her Majesty in Council a correct copy of the whole of the record,” etc.

These provisions of the Civil Procedure Code of 1882 appear to us to be *in pari materia* with section 19 of the Punjab Pre-emption Act, which finds a place in the chapter of the Act which deals with Procedure. We are justified, therefore, in construing clause (3) of section 19 of the Act in question with reference to the decisions of the Courts upon the similar provisions of the Civil Procedure Code to which

(1) 113 P. R., 1894.

we have referred, and we have accordingly the highest authority for holding that in provisions of this kind, the words "within a time to be fixed by the Court," or the like, do not preclude the Court from passing orders from time to time extending the period originally fixed by it, and this too even after the expiry of the time originally fixed by the Court (see *Burjore and Bhawani Pershad v. Bhagana* ⁽¹⁾, *Raja Ali v. Amir Hossain* ⁽²⁾, *Badri Narain v. Shiokoer* ⁽³⁾, and *Bhagwan Das Bagla v. Haji Abu Ahmad* ⁽⁴⁾, *Jumna Bai v. Visson Das* ⁽⁵⁾, *Chunni Lal v. Ajudhia Prasad* ⁽⁶⁾, *Chanda Singh v. Ishar Singh* ⁽⁷⁾, *Kidar Nath v. Mathu Mul* ⁽⁸⁾). The only qualifications to this rule that we know are (1) that the Court should not extend the period save for good and sufficient reasons; and (2) that in any event the extension of the period cannot, in certain cases, suffice to bring a claim within limitation when it would, save for such extension, be barred under the provisions of the Indian Limitation Act or any other statutory enactment which prescribes periods of limitation (see as to the latter class of cases, *Muhammad Ahmad v. Muhammad Siraj-ud-din* ⁽⁹⁾).

But, speaking generally, we have no hesitation in holding that there is nothing in clause (3) of section 19 of the Punjab Pre-emption Act to debar a Court from extending the period originally fixed by it and this too in a case where the period so fixed has expired prior to the making of the subsequent order. That this has been the view of the Legislature itself as regards the provisions of the Civil Procedure Code, is, we think, apparent from section 148 of the Civil Procedure Code of 1908.

In conclusion we may add a few words with regard to Mr. Dhanpat Rai's contention that the Court in extending the period in the cases in which we are asked to interfere on revision, acted *suo motu* and that the plaintiff in these cases made no application for such extension of time. There is nothing on the record of these cases to show that such an extension was prayed for, but we have little doubt that in point of fact the plaintiff in each case did make an oral application to that effect when they were informed that the securities tendered by them could not for various

(1) *I. L. R.*, X Cal., 557, P.C.

(2) *I. L. R.*, XVII Cal., 1, P.C.

(3) *I. L. R.*, XVII Cal., 512, P.C.

(4) *I. L. R.*, XVI Bom., 263.

(5) *I. L. R.*, XXIII All., 423.

(6) *I. L. R.*, XXI Bom., 576.

(7) *I. L. R.*, XIX All., 240.

(8) 113 P. R., 1894.

(9) 87 P. R., 1908.

asons be accepted. Naturally they would have made the application, but even if they did not, we see no reason why the Court should not of its own motion in such circumstances, give a plaintiff a further opportunity of complying with its order.

In view of our opinion as above expressed, we reject the petitions for revision with costs, and we answer the reference made to us by the Divisional Judge of Lahore in the terms set forth above.

Applications rejected.

No. 79.

Before Mr. Justice Johnstone.

SARDAR SINGH AND 2 OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

MAHARAJ DAS, VENDEE, AND LACHMAN SINGH,
VENDOR,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 884 of 1908.

Custom—Hindu Law—Alienation by childless proprietor—Sodhi Khatries of Mauza Hardo Jhanda, Tahsil Batala, District Gurdaspur—Onus probandi.

Held, that, among Sodhi Khatries of Mauza Hardo Jhanda, Tahsil Batala, District Gurdaspur, the onus of proving that they follow agricultural custom in regard to alienations is on the person alleging it.

Further appeal from the decree of B. H. Bird, Esquire, Additional Divisional Judge, Amritsar Division, dated the 27th April 1908.

Sukh Dial, for appellant.

Ishwar Das, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—Defendant is a sonless proprietor, Sodhi 18th Jany. 1909. Khatri by caste, and resident in Mauza Hardo Jhanda, Tahsil Batala. He has sold ancestral land for Rs. 2,000 to defendant 2, a stranger, and the plaintiffs, his near reversioners, have sued to have the sale declared inoperative as against them.

The sole question is whether these Sodhi Khatries follow Hindu Law or whether they are governed by the ordinary agricultural custom in such matters.

The first Court has held that custom is followed, and it has declared the sale inoperative, leaving a sum of Rs. 834 as a burden on the land as against plaintiffs, but the learned Divisional Judge took the opposite view and dismissed the suit. Plaintiffs appeal.

A very important point is the burden of proof, as to which see *Kartar Singh v. Mathar Singh* ⁽¹⁾, Khatries are undoubtedly not originally agriculturists, and the Sodhis have certain priestly attributes, which *prima facie* render it improbable that they should have adopted Jat custom. We must examine the rulings in connection with Sodhi Khatries, and must also consider the *status* and occupation of the family. Both the Courts below are agreed that the family now lives by agriculture, and that the ordinary occupations of Khatries generally and of Sodhis in particular, *viz.*, Sahukara and Sewaki and Sikhi, are not followed; and this seems to have been so since 1852 at least. On the other hand, these Sodhis do not form a compact village-community, but merely own certain areas in a village, the rest being held by Arains and Varaich Jats; and further, in the years 1898-1907 there have been no less than 27 alienations in the family, none of which has been contested. No doubt these transactions may yet be impugned, but the fact that no one has yet attacked them should not be left out of account.

Further, Dal Singh, ancestor of the Sodhis, did not found the village along with these Jats and Arains, but after the foundation, the owners made a grant of land to him, no doubt in recognition of his being a Sodhi. Thus, in my opinion, notwithstanding the case of 1877, which I will presently notice, upon the principles laid down for dealing with such cases, the *onus* should be laid upon the plaintiffs.

Mr. Sukh Dial, for appellants, relies upon *Sodhi Kartar Singh v. Sher Singh* ⁽²⁾, *Ram Chand v. Thakar Das* ⁽³⁾, and *Mohomed Hayat Khan v. Sandhi Khan* ⁽⁴⁾. The first of these deals with Sodhis of Muktsar in the Ferozepore District.

The grounds on which custom was held to prevail was that the family was in effect a leading agriculturist family in that country, that it had adopted the rule of

⁽¹⁾ 94 P. R., 1898.

⁽²⁾ 50 P. R., 1895.

⁽³⁾ 94 P. R., 1907.

⁽⁴⁾ 55 P. R., 1908.

primogeniture, which is, of course, opposed to Hindu Law, and that it owned whole villages.

The circumstances were thus peculiar. When a family holds a complete village and lives by agriculture, we can easily understand the members early coming to appreciate the value of the Jat rules in re alienation and the adoption by them of these rules, which are so powerful in holding a family together and in preventing the incursion of strangers. But such sentiments need not arise where the family merely own certain fields in a mixed village community.

Ram Chand v. Thakur Das ⁽¹⁾ does not help the appellants. It was a Brahmin case of *Tahsil Kasur*. For 8 generations these Brahmins had cultivated land, having settled originally with the founder, and there was evidence that they had "closely associated themselves with the Jat proprietors." None of these circumstances are to be found in the present case.

Mohomed Hayat Khan v. Sandhe Khan ⁽²⁾ is a Rajput case of a peculiar kind, and it has been quoted merely with reference to the remarks on page 276 regarding the matters to be taken into consideration when the issue, personal law v. custom comes up for decision. Mr. Sukh Dial relies upon the words: "If, for instance, a Khatri family acquires landed property in a village, or an entire village, and has for generations settled in rural life and lived upon agriculture as its principal means of livelihood, the family would, in my opinion, be bound by customs of agriculturists in matters relating to alienations of ancestral property." In connection with this judgment to which I was myself a party, I would point out, first, that the above remark is *obiter dictum*, the question for decision being whether urban property bought by a Rajput member of an agricultural tribe, out of savings of wages of service, could be freely sold or was subject to agricultural custom, and further, I would observe that later on (page 277, top) the same learned Judge lays stress upon the "spirit of self-preservation in village communities" shewing that he saw a distinction between the case of a compact community and mere casual landowners in a mixed village.

(1) 94 P. R., 1907.

(2) 55 P. R., 1908.

None of the rulings relied upon by Lala Ishwar Das is very much in point. *Jowahir Singh v. Jaqub Shah* ⁽¹⁾ (Koreshti case) is in its facts so different from the present case as not to be of much value, and a similar remark may be made as to *Atar Singh v. Prem Singh* ⁽²⁾.

But I would follow the reasoning in Civil Appeal 997 of 1906 (Chatterji and Johnstone, JJ.). That was a Kalal case, and the distinction between it and the *Kalalhatti* case was clearly drawn. *Kalalhatti* was a village entirely owned by Kalals for many generations, whereas the Kalals in the Civil Appeal quoted were four families owning 3 "ploughs" out of $11\frac{1}{4}$ "ploughs" in the miscellaneous *patti* of their village.

I must decline, therefore, to raise any presumption in favour of the view that these Sodhis follow custom, and it is clear that no custom has been proved. Indeed, the indications on the whole are against any customary restriction of the power of alienation. *Mehtab Singh v. Pertab Singh* ⁽³⁾ is of little value as a precedent. The two learned Judges disagreed, and the decision was in favour of custom merely because the Court below had so found. Appeal dismissed with costs.

Appeal dismissed.

No. 80.

Before Mr. Justice Johnstone and Mr. Justice
Shah Din.

GOKAL CHAND,—PLAINTIFF,

Versus

MUKHAN SINGH,—DEFENDANT.

Civil Reference No. 16 of 1908.

Civil Procedure Code, 1882, sections 525 and 522—Application under section 525—Premature if award had not been pronounced at date of application—Appeal lies in such a case although decree passed in accordance with award.

Held, that an application for filing an award under section 525, Civil Procedure Code, 1882, should be dismissed as premature and must fail where the award had not been pronounced orally or reduced to writing at the time of the application,

Held, also, that notwithstanding that the Court of first instance passed a decree in accordance with the award, an appeal lay to the District Court, as the first Court had dealt with an application which it had

⁽¹⁾ 5 P. R., 1906.

⁽²⁾ 12 P. R., 1906.

⁽³⁾ 16 P. R., 1877.

no power to entertain and which it should have rejected immediately the fact was made known to it, that the award was not in existence at the date of presentation of the application.

Bhagwan Singh v. Mussammatt Ram Kaur ⁽¹⁾ distinguished.

Case referred by C. Usborne, Esquire, District Judge, Rawalpindi, under section 617 of the Civil Procedure Code, on 26th February 1908.

Ram Bhaj Datta, for plaintiff.

Gobind Das, for defendant.

The judgment of the Court was delivered by

JOHNSTONE, J.—The learned District Judge of Rawalpindi 15th April 1909. has referred the following question to this Court for a ruling under section 617, Civil Procedure Code (1882), namely :—

Whether an application for filing an award under section 525, Civil Procedure Code, should be dismissed as premature and must fail because the award had not been pronounced orally or reduced to writing at the time of the application? Mr. Gobind Das appears to support an affirmative answer to this question, while Mr. Rambhaj Datta supports the negative. After duly considering the wording of section 525 and connected sections, and after giving our best attention to the arguments laid before us and to the authorities quoted, we have arrived at the conclusion that the affirmative answer is the correct one.

The way we look at the matter is this. Under section 525 the application is and must be “to file” an award, and we are unable to see how anything but a duly made and written award can be “filed.” *Ex-hypothesi* in the present case the award had not been made either orally or in writing when on 17th May 1907 applicant filed his petition under that section. He seems to have known what the award was going to be; but we must take it, for the purposes of this reference, that it was not made until 19th June 1907, the date of the written award. We may note, in confirmation of the above view, that the words in section 525 “an award has been made thereon” help to make it quite clear that an application to file an award before the award has been made is premature and virtually contains a contradiction in terms.

Except one doubtful authority, which will be noticed presently, all the rulings we have seen favour the above view.

(1) 38 P. L. R., 1906.

In *Gopi Reddi v. Mahanandi Reddi* ⁽¹⁾ it was even held that, where an award had been made and reduced to a writing which had been lost, application under section 525 was not competent, inasmuch as only a written award, i.e., only the actual writing containing the award, can be "filed." In *Sustee Churn Chukerbutty v. Taruck Ohunder Chatterjee* ⁽²⁾ certain observations point the same way, and at pp. 762, 771 and 772 of *Mahomed Wahid-ud-din v. Hakimian* ⁽³⁾ the opinions of the learned Judge of that Court are seen to be clearly against Mr. Rambhaji Datta's contentions.

The ruling relied upon by him is *Bhagwan Singh v. Mussammat Ram Kaur* ⁽⁴⁾. In that case the application was to file the agreement and the award, and was expressly under section 523 with section 525; and further, the question was not in terms whether the application was premature, the award not having been made or reduced to writing till after the date of the application, but rather *whether the award was invalid* because not made till after the application? That is, of course, not the same question as the one before us. We are not asked to say whether the award in the present case was invalid because made after 17th May 1907, but whether the application was premature or not.

We need, therefore, express no opinion as to whether the ruling of 1906 is sound or not; but a remark about that ruling will be found necessary later on.

We had better now notice a few of the arguments put before us by Mr. Rambhaji Datta. First, he contends that there is no legal reference before us at all, for the decree was in accordance with the award and therefore no appeal lay against the decree. In our opinion an appeal did lie to the District Judge. The case is not a simple one of a Court acting within its powers and giving a decree in accordance with an award. It is a case of a Court dealing with an application which it had no power to entertain, and which it should have rejected immediately the fact was made known to it that the award was not in existence at the date of presentation of the application.

Then Mr. Rambhaji Datta goes on to argue that the District Judge, having before him a Chief Court ruling, *Bhagwan Singh v. Mussammat Ram Kaur* ⁽⁴⁾ was bound to follow it and to ignore

⁽¹⁾ *I. L. R.*, XII *Mad.*, 331.

⁽²⁾ 15 *W. R.*, 9, *F. B.*

⁽³⁾ *I. L. R.*, XXV *Cal.*, 757, *F. B.*

⁽⁴⁾ 38 *P. L. R.*, 1906.

the rulings of other High Courts and his own personal views of the law, *Kasu v. Atar Singh* ⁽¹⁾ and thus should not have made this reference, but should have decided the point himself. We think our explanation above of the Chief Court ruling and what it really lays down sufficiently refutes this argument. The District Judge in our opinion may well have had "reasonable doubt" as to the law.

Thirdly, we are asked to read section 526 along with section 525 and to hold that the law is sufficiently complied with, if the applicant honestly states in his petition that an award has been made and the award, though not ready then, is ready for adjudication and is put in when the opposite party appears and joins issue and the Court sits to consider the pleadings. In our opinion this was not the intention of the Legislature. Section 525 provides a peculiar procedure and a peculiar remedy, different from that laid down and provided for ordinary suits, and that section makes an application competent only when an award has been already made. To use the section an applicant must show that the circumstances of his case exactly square with the section.

In the question referred we have also the words "and must fail," which apparently let in equitable considerations apart from strict law and procedure, and so Mr. Rambhaji Datta, fourthly contends that, inasmuch as defendants did not on 19th June 1907, when the award was put in, at once raise the question now referred, but only did so on 3rd July 1906 after they had engaged a pleader, the raising of the question was too late. We think such a view as this is very harsh and is contrary to the spirit of the practice of the Courts of this Province. We hold that, as the application was premature, it must fail notwithstanding the few days' delay on the part of the defendants in taking the objection.

Lastly, it is urged that the application might in view of some general words at the end, be taken as one under section 523. It is, of course, clear that, when an application is made under section 523, it is for the filing in Court of the agreement to arbitrate, and the object is to move the Court to call upon the arbitrator to do his duty. *Ex-hypothesi* in such a case the award has not been made and the arbitrator is to be asked to make it. In the present case, on 19th June 1907, or 3rd July

(1) 103 P. R., 1908, F. 5.

1907, it had become impossible for the Court to follow the procedure required by section 523 and section 524, and we are unable to see how we can now go back to those sections. If there is anything unsound or any confusion of thought in *Bhagwan Singh v. Mussammut Ram Kaur* (1) as to which we offer no definite opinion, it is because the essential difference between an application under section 523 and one under section 525 was lost sight of, and it was perhaps not altogether understood that the same application could not be one under both sections.

We find it very difficult to see why applicant, when he found the award had not been prepared before 17th May 1907, did not withdraw his application and present a fresh one when the award had been reduced to writing.

We answer the reference in the affirmative and return the papers to the District Court. Costs to be costs in the cause.

No. 81.

Before Mr. Justice Reid, Chief Judge, and Mr. Justice Robertson.

ALI GAUHAR, &C.,—(PLAINTIFFS),—PETITIONERS,

Versus

SARDAR KHAN, &C.,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 796 of 1908.

Specific Relief Act, I of 1877, section 42, proviso—Declaratory suit brought under direction of Revenue Court under section 98 (1) of the Punjab Tenancy Act, XVI of 1887.

The plaintiffs were the brothers of one Buta Khan deceased, who, by his will, left his landed property to his brothers and sons in certain proportions. Upon Buta Khan's death mutation was effected of the property entirely in favour of the sons and widows. The plaintiffs were in possession of only a small area of 12 *kanals* 19 *marlas* in one village, and were, in respect of this, recorded as tenants-at-will holding under the sons. The sons got notice of ejectment issued in regard to this land. The brothers then sued in the Revenue Court to contest the notice of ejectment, and the Revenue Court passed an order under section 98 (1) of the Punjab Tenancy Act, 1887, requiring the brothers to bring a civil suit for the purpose of determining the validity of the will. The brothers then brought the present suit for a declaration that the will is valid, and that the defendants have no right to oust them from the 12 *kanals* 19 *marlas* of land in their possession. The lower Courts held that the suit was barred under the proviso of section 42 of the Specific Relief

(1) 38 P. L. R., 1906.

Act, 1877, plaintiffs not having included in their suit a claim for possession to their shares according to the will in the portions of the estate of which they were at present out of possession.

Held that the cause of action was the notice of ejectment, and the relief sought was a declaration that the will was valid and that the plaintiffs were not liable to ejectment, and so far as the ejectment proceedings were concerned, the suit included all the relief to which the plaintiffs (who were in possession of 12 *kanals* 19 *marlas*) were entitled in respect of the proceedings of the Revenue Courts, the mere fact that the will on which plaintiffs based their title to that area purported also to convey title to other property being immaterial.

Held, therefore, that the suit was not barred under the proviso of section 42 of the Specific Relief Act, 1877.

Petition for Revision of the order of W. Chevis, Esquire, Divisional Judge, Sialkot Division, dated the 14th December 1907.

Fazal Hosain, for petitioners.

Nabi Bakhsh, for respondents.

The judgment of the Court was delivered by

REID, C. J.—The facts are stated in the judgments of the 24th April 1909. Courts below.

The Lower Appellate Court has dismissed the suit on the ground that the will, under which the plaintiffs-petitioners claimed title to the 12 *kanals* 19 *marlas* in suit, purported also to confer on them title to land of which they were not in possession, and that the proviso to section 42 of the Specific Relief Act barred the suit for a declaration only, the plaintiffs being able to seek further relief, *viz.*, possession of the land of which they were not in possession.

This conclusion is, in our opinion, unsound.

The Revenue Court, in which the plaintiffs' suit to contest notice of ejectment from the 12 *kanals* 19 *marlas* had been filed, required them, under section 98 of the Tenancy Act, to institute a suit in the Civil Court for the purpose of obtaining a decision on the question of title, and the suit is, in our opinion, limited to the 12 *kanals* 19 *marlas*, the mere fact that the will, on which plaintiffs based their title to that area, purported also to convey title to other property, being immaterial.

The cause of action was the notice of ejectment, and the relief sought was a declaration that the will was valid, and that the plaintiffs were not liable to ejectment, and, so far as the ejectment proceedings were concerned, the suit included all the relief to which the plaintiffs, who were in possession of the 12 *kanals* 19 *marlas*, were entitled in respect of the

proceedings in the Revenue Court. *Ram Rakha v. Narinjan Das* (1), *Gopal v. Shewag Ram* (2), *Sadubin Raghu v. Ram-bin Govind* (3), *Kunj Bihari Prasadji v. Keshan Lal Hira Lal* (4) are authority, if authority is necessary for this conclusion.

The question, how far a decision in this suit on the validity of the will may be binding in a subsequent suit for possession of the other property affected by the will, must be decided when it arises. The fact that this decision may be held in such suit to make the matter in dispute *res judicata* does not affect the relief to which the plaintiffs are entitled in the present suit.

We allow this application, set aside the decree of the Lower Appellate Court and remand the appeal under Order XLI, rule 23, for decision on the merits. Costs of this Court will be costs in the cause.

Case remanded.

No. 82.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

BISHAN DAS,—(DEFENDANT),—APPELLANT,

Versus

MASSU,—(PLAINTIFF),— }
LAKHU,—(DEFENDANT),— } RESPONDENTS.

Miscellaneous Appeal No. 1317 of 1908.

Pre-emption—Agricultural land—Punjab Pre-emption Act, II of 1905, section 4—No right of pre-emption arises on mortgages or on foreclosure of a right to redeem a mortgage.

One L mortgaged his agricultural land by way of conditional sale to B D—B D had notice issued on L under Regulation XVII of 1806, the year of grace expired on 5th June 1901. In 1905 B D brought a suit to obtain possession of the land. The claim was contested by L, but a compromise was arrived at, and it was agreed that the land should remain in the possession of the mortgagee (B D), and that if L (the mortgagor) failed to redeem the mortgage within two years on payment of the mortgage debt together with costs, the mortgagee should, on the expiration of that period, be deemed to be the absolute owner of the land. The Court passed a decree in conformity with the said compromise on 3rd March 1905. The mortgagor failed to redeem the land within the said period. His brother, the present plaintiff, now brings a suit for pre-emption.

MISCELLANEOUS
SIDE.

(1) 182 P. R., 1883.

(2) 12 P. R., 1899.

(3) I. L. R., XVI Bom., 608.

(4) I. L. R., XXVIII Bom., 567.

Held, (1) that if the said decree conferred upon the mortgagee no more extensive rights than that of a mortgagee, the plaintiff's suit must fail, as the Punjab Pre-emption Act of 1905 does not recognise the right of pre-mortgage.

And (2) if the mortgagee by virtue of the decree became entitled after the expiry of two years to absolute ownership, the plaintiff's suit must also fail, as, in that event, he must be taken to be suing for pre-emption in respect of a transaction which amounts to a foreclosure of the mortgagee's right to redeem the land, and under section 4 of the Punjab Pre-emption Act of 1905, no right of pre-emption arises on the foreclosure of a right to redeem in respect of agricultural land.

Miscellaneous appeal from the order of Khan Bahadar Khan Abdul Ghafur Khan, Divisional Judge, Sialkot Division, dated the 13th October 1908.

Kharak Singh, for appellant.

The judgment of the Court was delivered by

RATTIGAN, J.—One Lakhu mortgaged his agricultural land 26th April 1909. by way of conditional sale to Bishan Das, and the year of grace is said to have expired on the 5th June 1901. In 1905 Bishan Das brought a civil suit to obtain possession of the land. This claim was contested by Lakhu, but a compromise was arrived at, and it was agreed between the parties that the land should remain in the possession of the mortgagee (Bishan Das), and that if Lakhu (the mortgagor) failed to redeem the mortgage within two years, on payment of the mortgage debt and costs, the mortgagee should, on the expiration of that period, be deemed to be the absolute owner of the land. The Court accepted this compromise and passed a decree, on the 3rd March 1905, in accordance therewith. The mortgagor failed to redeem the mortgage within the said period of two years. Plaintiff, the brother of the mortgagor, now sues for pre-emption in respect of the said "sale," and the question is whether his claim is entertainable.

We have unfortunately not had the advantage of hearing any learned counsel on behalf of the pre-emptor as he appeared in person, but after giving the case our most careful consideration, we have no hesitation in holding that plaintiff's claim for pre-emption must fail. It may be that the Court was not justified in giving the mortgagee a decree of the kind which it passed on the 3rd March 1905, for section 10 of the Punjab Land Alienation Act provides that "in any mortgage of land made after the commencement of this Act, any condition which is intended to operate by way of conditional sale shall be null and void." The decree in question was based upon an agree-

ment made in 1905, *i.e.*, after the said Act had come into force, and it is clear that whatever may have been the rights of the mortgagor and mortgagee previously to the date of such agreement, those rights were merged in that agreement, and that such agreement was the basis upon which the Court passed its decree. In the circumstances it would seem that the decree was illegal as being contrary to the express provisions of section 10 of the Punjab Alienation of Land Act. But even if this were so, plaintiff obviously cannot take advantage of the fact, as in that event, the respondent, Bishan Das, must be held to be merely a mortgagee of the land, the condition which was intended to operate by way of conditional sale in his favour being null and void. Whether the decree is good and valid as between the mortgagor, Lakhu, and the present respondent, is a question which may not be easy to decide, but it is not now before us, and upon it we offer no opinion. We need only remark that even if the decree of the 3rd March 1905 must in law be taken to have conferred upon the mortgagee, Bishan Das, no more extensive rights than that of a mortgagee, plaintiff's claim for pre-emption must be dismissed as the Punjab Pre-emption Act of 1905 does not recognise the right of pre-mortgage. But assuming for the sake of argument, that the respondent, by virtue of the decree based on the agreement, became entitled after the expiration of the two years, to absolute ownership of the land, we are still of opinion that plaintiff's present claim must fail, as in that event he must be taken to be suing for pre-emption in respect of a transaction which amounts to a foreclosure of the mortgagor's right to redeem the land. Under the terms of the agreement which was embodied in the said decree, the mortgagor was given a period of two years within which to redeem the land, and it was provided that if he did not redeem the land within that period, his right to redeem would be for ever foreclosed. This was obviously the tenor of the decree. The mortgagor, in point of fact, did not redeem the land within the specified period, and as a consequence his right to redeem was foreclosed. The effect of this was, of course (other considerations apart), that the land became absolutely sold to the mortgagee in one sense. That was the practical result of the decree, but the fact remains that the land became the property of the mortgagee simply because the mortgagor's right to redeem was gone. In other words, the mortgagee became owner by reason of the foreclosure of the mortgagor's right to redeem, and it is clear from the provisions of section 4 of the Punjab Pre-emption Act, that the right of pre-emption does not

arise on the foreclosure of a right to redeem agricultural land. We cannot agree with the learned Divisional Judge that section 4 of the Punjab Pre-emption Act, which, by implication, precludes claims for pre-emption of agricultural land no foreclosure of the right to redeem such land, refers only to those cases in which there is a mortgage by way of conditional sale and the mortgagee has not obtained an absolute title in accordance with the provisions of Regulation XVII of 1806.

The section expressly provides that the right of pre-emption arises in respect of agricultural land only in the case of sales, and in respect of village or urban immoveable property only in the case of sales or of foreclosures of the right to redeem such property. The obvious inference is that no right of pre-emption can arise in respect of agricultural land in the case of a foreclosure of the right to redeem such land. The result may be anomalous, but as the terms of the section are perfectly clear, it is not for us on that account to grant a decree for pre-emption on a ground not recognised by the law. The distinction, which the learned Divisional Judge attempts to draw between the case of a mortgage by way of conditional sale before and after the sale has become absolute has no justification in law for the simple reason that in all such cases the mortgagee, when he does become the absolute owner, becomes such merely by reason of the fact that the mortgagor's right to redeem has been foreclosed. In one sense this is a sale, but it is a sale of a special and peculiar character, and the legislature has, in express terms, provided that in the case of "sales" of this special kind, pre-emption can be claimed only if the property is *not* agricultural land. Here the property is agricultural land, and we must, therefore, hold that no right of pre-emption can be claimed by plaintiff in respect of the transaction which resulted in the foreclosure of the mortgagor's right to redeem.

The present litigation would never have ensued if the *Munsif* of Gujranwala, who passed the decree of the 3rd March 1905, had taken the trouble to observe the provisions of section 10 of the Punjab Alienation of Land Act. Unfortunately he entirely ignored those provisions, and accepted an agreement which was in direct contravention thereof, and granted the mortgagee a decree in accordance with that agreement. The result has been an expensive litigation for which the plaintiff cannot well be held to be solely responsible.

We find ourselves placed in rather an anomalous position in this case. The transaction upon which both parties rely amounts to a mortgage by way of conditional sale. It was effected after the coming into operation of Act XIII of 1900, and is, therefore, null and void *pro tanto* under section 10 of the Act, though possibly the mortgagor may nevertheless be bound by a decree which, so far as he is concerned, became final. But while the transaction was clearly one in contravention of the provisions of the said Act, we have, in the present suit, no power to act under section 9 (3) of the Act, as the present proceedings are not for the purpose of enforcing the condition intended to operate by way of conditional sale. We cannot, therefore, take action under that clause, and refer the case to the Deputy Commissioner. All that we can decide is, that plaintiff's claim for pre-emption must fail, and we, therefore, accept the appeal, and reversing the decree of the Lower Appellate Court, we dismiss the suit. In view of the very peculiar circumstances and having regard to the fact that this litigation would never have taken place if the *Munsif* had acted, in 1905, in accordance with the provisions of Act XIII of 1900, we think that each party may fairly be left to pay its own costs throughout, and we direct accordingly.

Appeal accepted.

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No. 83.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

NABI BAKHSH,—(PLAINTIFF),—APPELLANT,

Versus

RAHIM BAKHSH,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 789 of 1908.

Betrothal contract—Suit for damages for breach of—Proper person to sue and to be sued.

Held, that it is competent for the plaintiff, a minor, for whose direct benefit the betrothal contract was effected between his father and the father of the girl, to sue for damages in respect of its breach, and the proper person to be sued is the father of the girl who broke it and not the girl who was no direct party to the contract.

Further appeal from the decree of W. A. Le-Rossignal, Esquire, Divisional Judge, Amritsar Division, dated the 1st April 1908.

Obedulla, for appellant.

Turner, for respondent.

APPELLATE SIDE. }

The judgment of the Court was delivered by

RATTIGAN, J.—The sole point, upon which this petition for 27th April 1909. revision was admitted as a further appeal, under section 70 (1) (b) of the Punjab Courts Act (as amended), was whether it was competent for the plaintiff, a minor, to sue, through his father as next friend, for damages for breach of a betrothal contract entered into between his father on the one hand, and the defendants, Rahim Bakhsh (the father of the girl) and Miran Bakhsh (the uncle of the girl), on the other hand.

The Courts below are agreed that the contract in question was actually made, and further, that plaintiff's father on his behalf expended various sums in connection with this betrothal. Plaintiff claims Rs. 285 in this respect, and the Courts concur in holding that some such sum must have been paid. Plaintiff further claimed a sum of Rs. 200 as damages for loss to his reputation by the repudiation of the contract by defendant No. 1. The *Munsif* accepted this sum as reasonable compensation, but the Divisional Judge was of opinion that Rs. 15 would amply suffice to compensate plaintiff in this respect, should it be held that he had any *locus standi* to bring the present suit.

The learned Judge, however, held, relying upon an unreported decision of a Judge of this Court (C. A. No. 719 of 1903) that in a case of this kind, it was not competent to plaintiff to sue in his own name for compensation for breach of the said contract, and further, that if plaintiff had a right to sue, the proper person to be made a defendant was not the father or the uncle of the girl, but the girl herself. He accordingly dismissed the suit with costs.

Plaintiff has applied to this Court for revision of the decree of the Divisional Judge, and the application has been admitted as a further appeal in view of the conflicting decisions of two learned Judges of this Court. We have already referred to the one decision; the other will be found reported as *Muhammad Omar v. Budha* ⁽¹⁾. The parties before us are Muhammadans and governed by their personal law, under the provisions of which it is clear that the fathers of a minor boy and a minor girl have full power to effect a valid contract of marriage between them. (Wilson's "Digest of Anglo-Muhammadan Law," 2nd edition, para. 18). The contract in such cases, though made by the fathers of the parties, is made on behalf, and for the benefit of, the latter, and we see no reason

⁽¹⁾ 3 P. R., 1909.

why in such a case the party, who is aggrieved by the breach of the contract made in his or her behalf, should not be entitled to sue for damages in respect thereof. In support of this view we have not only the decision of Lal Chand, J., in *Muhammad Omar v. Budha* ⁽¹⁾, but a strong expression of opinion in *Dhoni v. Ishar Das* ⁽²⁾, and equally strong *dicta* in the case of *Purshotam Das Tribhavan Das v. Purshotum Das Mangal Das* ⁽³⁾. The contract was made for the benefit of the plaintiff; and whatever may be the view of the English Courts upon the subject, the law of this country, as also the law of the United States of America, is that "a third person for whose benefit a promise is made by A, upon a consideration moving from B, may maintain an action upon the promise, provided he is the person directly intended to be benefited." (*Daropti v. Jaspat Rai* ⁽⁴⁾, at p. 176). In the case last cited, it was pointed out that under the provisions of the Indian Contract Act, "consideration", as defined in section 2 (d) of that Act, includes consideration moving from a third party (any other person), and that the English rule that it must move from the promisee himself has not been accepted. The learned Judges add:— "The doctrine of the American Courts appears also to be more in accord with the Contract Law of India and to be applicable to the Indian Courts. In view of the differences that undoubtedly exist between the Indian and the English Contract Law, it is more consonant to reason that we should follow the American opinion, and the earlier decision of the English Courts rather than the later rule enunciated by the latter Courts. It is important, likewise, to consider the intention of the parties when present agreement was made. Was it not intended that the plaintiff should have the benefit of its provisions, and does not that involve that she should be competent to enforce them? We do not lose sight of the fact that from the later English cases it is quite clear that the most express agreement of the contracting parties cannot confer a right of action on the contract on a person who is not a party (Pollock, p. 203). But the true view of the contract here is that it was one between plaintiff and the defendant, and that in entering into it, plaintiff's father acted for her."

From these extracts it is clear that the learned Judges were of opinion that in a case where A has made a contract with B for the benefit of X, X has a right to enforce that contract,

(1) 3 P. R., 1909.

(2) 174 P. R., 1882.

(3) I. L. R., XXI Bom., 23.

(4) 49 P. R., 1905.

although consideration for the contract did not move from him but from A. Accepting this view, we hold that in the present case it was competent to plaintiff, for whose direct benefit the betrothal contract was effected between his father and defendant No. 1, to sue for damages in respect of its breach. The learned Divisional Judge holds that, if plaintiff is entitled to sue, it necessarily follows that the only person he can sue, is the girl who was betrothed to him. We cannot follow this argument. The contract was made by the plaintiff's father and the father of the girl. They were the parties to the agreement, and ordinarily a suit in respect of the breach of the agreement would lie at the instance only of one of them against the other. But by the law of this country it is competent to a third person, for whose direct benefit the agreement was made, to sue for damages for breach of that agreement. This fact, however, cannot affect the question as to the person against whom the suit is to be brought. Obviously, the latter is the person who entered into the agreement which has been broken, and in the case before us the person guilty of the breach of the agreement is the father of the girl, and it was he who made the contract. The suit has, therefore, quite rightly been instituted against him and not against the girl, who was no direct party to the contract. From the fact that it is competent to plaintiff as being the person for whose benefit the contract was made, to sue for damages for its breach, it is not a logical or necessary deduction that the person to be sued is the girl, who was not a party to the contract, though she also was to be benefited thereby. But even if the plaintiff had not had a *locus standi*, we think the Divisional Judge would have been well advised in taking action under either section 27 or section 32 of the Civil Procedure Code, 1882, and instead of dismissing the suit on a mere technical ground, in substituting plaintiff's father as the plaintiff. The latter was already on the record as the next friend of the plaintiff, and in ordinary justice the Court should have proceeded in the manner suggested. We might add one word in conclusion with regard to Mr. Turner's contention that plaintiff cannot sue for sums expended by his father in respect of this contract. It may be conceded that these various sums were actually paid by the plaintiff's father, but the fact remains that they were admittedly so paid by the latter on behalf of his son, and the view we take of the transactions is that the father practically made a gift of these sums to his son for the purposes of the betrothal and that they were, therefore, in reality paid by the son for the benefit of his future wife. But even if this theory cannot be accepted, it is obvious that, in the

present case plaintiff's father, who is acting as his son's next friend, would be estopped, from hereafter setting up any claim to those sums on his own account.

Upon this appeal (which is one under section 70 (1) (b) of the Punjab Courts Act) we cannot go behind the findings of the Lower Appellate Court, and we must, therefore, accept these findings as to the amounts claimable by the plaintiff, in the event of his being entitled to maintain the suit. We, therefore, accept this appeal to the extent of holding that plaintiff had a *locus standi* to sue in his own name, but we maintain the finding of the Divisional Judge that he is entitled only to Rs. 285 for sums expended and to Rs. 15 as damages for loss to his reputation. Respondent, Rahim Bakhsh, must pay proportionate costs throughout.

Appeal accepted.

No. 84.

Before Mr. Justice Reid, Chief Judge, and Mr. Justice Robertson

GURDIT SINGH,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT PREM KAUR AND OTHERS (DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE. {

Civil Appeal No. 930 of 1908.

Custom—Succession—Daughter's right to succeed to property gifted to her grandfather in preference to male descendants of donor.

Held, that daughters are heirs under Hindu Law as well as under customary law, and that under customary law, the male descendants of a donor are not entitled to oust the female descendants of the donee in the direct line.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 4th July 1908.

Muhammad Shafi, for appellant.

Dwarka Das, for respondents.

The judgment of the Court was delivered by—

23rd April 1909. ROBERTSON, J.—The facts of this case as alleged are as follows:—

It is shown in the pedigree table of the settlement of the village of *mauza Konkpur* in 1888 that one Lalji brought in his relative Mohar Singh and shared his proprietary holding with him. No entry was made in the Record of 1853. The learned Divisional Judge has not discussed the question whether

there was or was not a gift in fact, or whether the gift was one of such a nature as to come within the purview of the ruling in *Sita Ram v. Raja Ram* (1), see *Nihala v. Rahmatullah* (2). Both of these points are arguable. The learned Divisional Judge has dismissed the claim on other grounds. Mohar Singh had three sons; they all died sonless, but one left a daughter, to whom his widow has gifted the property in question. It is admitted that the widow's gift can only take effect for her own life, but it is contended that the daughter will succeed as heir, and the learned Divisional Judge has so found. The descendants of Lalji claim to oust Mohar Singh's son's daughter. The learned counsel for the appellant relied mainly on this argument. Collaterals would, had the land been ancestral, have excluded the daughter. The collaterals could not have excluded the descendants of the donor, not being lineal descendants of the donee, consequently the descendants of the donor exclude the daughter.

It is at once clear that there is a *non sequitur* here. The collaterals do not come in at all. Their rights are not in conflict with the daughters, in as much as they would be equally out of Court if there were no daughter at all. The real question is, so long as there are direct lineal heirs at all, male or female, of the donee, can the descendants of the donor claim to oust them?

No doubt in the case of ancestral property, in many cases near collaterals, in some cases more remote collaterals, take before daughters. But daughters are heirs under Hindu Law, and even under customary law, although their rights are often postponed to agnates further removed than themselves, to use a mathematical phrase, "in the limit", a daughter is an heir—in some cases, she would exclude agnates of various degrees of remoteness, and in all cases, or practically all cases, she would succeed if there be no agnates.

The learned counsel for the appellant admitted that he could not quote any authority in which it was laid down that when there are daughters, land, which has been gifted to her lineal ancestors, reverts to the donor's line. *Hayat Muhammad v. Ali Bukhsh* (3), was a case in which a man had died leaving no issue, neither son nor daughter, and the conflict was between the donor's line and collaterals whose ancestors had not enjoyed the land.

(1) 12 P. R., 1892, F. B.

(2) 137 P. R., 1908.

(3) 19 P. R., 1903.

We are unable to hold, in the absence of authority, that a daughter is not an heir of the body, and that the descendants of a donor are entitled to oust the female descendants of the donee in the direct line. For these reasons, the appeal fails and is dismissed with costs.

Appeal dismissed.

No. 85.

Before Mr. Justice Reid, Chief Judge, and Mr. Justice Robertson.

DHAN SINGH AND OTHERS,—(PLAINTIFFS)—
APPELLANTS,

Versus

HAR NARAIN AND OTHERS,—(DEFENDANTS)—
RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 995 of 1908.

Absentees—Entry in Wajib-ul-arz subsequent to abandonment—No trust—Adverse possession.

Held, that an entry in the record of rights providing, that when the plaintiffs-absentees (who left their land 20 years previously without making any arrangements for the payment of the revenue) return and want the land, they can take it back, does not constitute a trust, antedating to the original abandonment by the plaintiffs, and that the plaintiffs having failed to prove that during the last 40 years they have had any connection with the land or shared its profits, the respondents have acquired title by adverse possession.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 1st July 1908.

Muhammad Hussain, for appellants.

Gullu Ram and Beni Pershad, for respondents.

The judgment of the Court was delivered by—

24th April 1909.

REID, C. J.—The question for consideration is, whether the respondents have acquired title, by adverse possession for 12 years, to the land in suit. They have occupied the land for more than 40 years, but the appellants plead that the possession has been as trustees, the record of rights of 1880 providing that when the absentees return and want the land, they can take it back.

We concur with the Lower Appellate Court in the conclusion that this entry does not constitute a trust, antedating to the original abandonment by the first plaintiff and the father of the three other plaintiffs.

Harbhaj v. Gumani (1), *Barkat v. Daulat* (2), *Fazal Din v. Shah Muhammad* (3) and *Jodha v. Dhani Ram* (4) are directly in point. The authorities cited for the appellants do not help them—*Ruldo v. Kaisra Singh* (5) dealt with a case in which the absentee had returned, been restored to possession and subsequently ousted. *Ghodar v. Gurbakhsh* (6) was a case of brothers, apparently joint. The other authorities cited are still more inapplicable. Having failed to establish a trust, the appellant's case is hopeless. They lived within five miles of the land in suit and have failed to prove that during the last 40 years they have had anything to do with it or shared in its profits. There is ample authority, including *Ilahi Bakhsh v. Shams-ud-Din* (7), and *Mussammat Nihal Kour v. Chanda Singh* (8), for holding that the respondents have acquired title by adverse possession, they and the appellants not having held jointly a *khata* of which the land in suit is part.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 86.

Before Mr. Justice Johnstone, and Mr. Justice Rattigan.

NAND SINGH AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

Versus

NATHA SINGH AND OTHERS,—(PLAINTIFFS),—

JHANDA SINGH AND OTHERS,—(DEFENDANTS),—

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1297 of 1907.

Indian Limitation Act, XV of 1877, Articles 142 and 144—Absentee—Adverse possession in joint holding.

Where plaintiffs-absentees had, 29 years before the present suit for possession, brought a suit for a declaration that they were co-sharers,

(1) *I. L. R., II All.*, 493.

(2) *I. L. R., IV All.*, 187.

(3) *141 P. R.*, 1883.

(4) *30 P. R.*, 1901.

(5) *5 P. R.*, 1871.

(6) *73 P. R.*, 1874.

(7) *109 P. R.*, 1892.

(8) *118 P. R.*, 1893.

the cause of action being that in consequence of the hoodwinking of the *Patwari* by a defendant, the former had omitted plaintiffs' names from the list of proprietors in the *naqsha girdawari* (which suit was dismissed for default without defendants being summoned),

Held, that the conduct of the defendants, which led to the previous suit, amounted to an overt act of dispossession and denial of title and so set limitation running, and that the defendants' possession was adverse, though ordinarily the possession of a sharer is the possession of his co-sharer.

Further appeal from the decree of S. W. Gracy, Esquire, Divisional Judge, Amritsar Division, dated the 26th August 1907.

Oertel and Gunpat Rai, for appellants.

Obedulla, for respondents.

The judgment of the Court was delivered by—

21st April 1909.

JOHNSTONE, J.—This is a suit by the absentee descendants of certain former co-sharers in a joint *khata* in *maura* Kala, District Amritsar. It is impossible to say precisely when absence first occurred, but we may take as near the truth the statements in the Settlement Record of 1865, that it had lasted 80 years, and in that of 1891-92 that it had lasted 107 years. Plaintiffs, asserting their relationship to certain deceased co-sharers, claimed their own shares as heirs. They alleged that, though entered as absentees in the papers, they had been receiving profits of the land. Defendants pleaded adverse possession, abandonment and *res judicata* by reason of a suit by plaintiffs in 1877.

The First Court held the suit barred by time, as not having been brought within 12 years of 1877. It also held it not proved that plaintiffs had ever received any share of the profits, and found further that the case was one of abandonment of the clearest kind, but it ruled that the doctrine of *res judicata* had no application.

The learned Divisional Judge was not quite clear as to the facts. He has written in his judgment that plaintiffs were absent in 1852 but not in 1865. This is quite wrong. They were absent all along until 1877 when they brought a suit, and then till 1891-92, and even later. He held abandonment not made out, because the suit of 1877 shewed that "they kept an eye on the entries"; and he found the plea of *res judicata* not established. He ruled further, that adverse possession was not proved by what happened in 1877, because plaintiffs' names still continued to be entered in the *jamabandis*, though they had been kept out of the *naqsha girdawari*.

Defendants have appealed, and the appeal must succeed. We agree with the Courts below as to *res judicata*, and indeed the plea has been dropped. But a perusal of the authorities noted in the margin* shews that the finding of the Lower Appellate Courts as to adverse possession and limitation is unsound. In 1877 the father of one present plaintiff and the other present plaintiff and certain other persons sued for a declaration that in 106 *ghumaos* (virtually the land in suit) they were co-sharers, the cause of action being that in consequence of the hoodwinking of the *Patwari* by a defendant, he had omitted plaintiffs' names from the list of proprietors in the *naqsha girdawari*. The suit was dismissed for default without defendants being summoned. In our opinion this transaction must be interpreted in a reasonable way. Plaintiffs in it asserted that defendants, or one of them, had intimated to the *Patwari* that they (defendants) alone were owners of the land and that plaintiffs had no shares in it, and that plaintiffs' names should be kept out of the *girdawari*, thus attacking plaintiffs' title and giving out that they (defendants) intended to hold exclusively in future. Defendants were in exclusive possession; and we think that, though ordinarily the possession of a sharer is the possession of his co-sharers and is not adverse to them, yet the conduct of defendants, which led to the suit of 1877, amounted to an overt act of dispossession and denial of title and so set limitation running. The ruling *Ditu v. Devi Dial* (3) quoted by plaintiffs' pleader, seems to us dead against them.

* Nawab Moham-med Amanulla Khan v. Badan Singh (1), Ilahi Bakhsh v. Shams-ud-Din (2), Jodha v. Dhani Ram (3), Mussammatt Nihal Kour v. Chanda Singh (4).

It is not necessary to decide the question of abandonment; but we may note that we, by no means, concur in the learned Divisional Judge's way of looking at the question. If abandonment took place, it did so long before 1877. Plaintiffs and their ancestors had, by that time, been absent the best part of a century, and, though they lived only some 14 miles away, in all that time they are not shown to have taken any share in the management of the land or to have participated in the profits. The question is whether this amounts to abandonment; and their reviving antiquated claims in 1877 is not even *prima facie* proof that during all that 100 years they or their fathers cherished any *animus revertendi*.

We accept the appeal, set aside the Lower Appellate Court's judgment and decree, and dismiss plaintiffs' suit with costs throughout.

Appeal accepted.

(1) 23 P. R., 90 P. C. (2) 30 P. R., 1901.

(3) 109 P. R., 1892. (4) 118 P. R., 1893.

(5) 189 P. R., 1889.

No. 87.

Before Mr. Justice Shah Din.

DALO, MUSSAMMAT GULABI AND OTHERS,—
(DEFENDANTS),—APPELLENTS,

Versus

MOHLU, UDHAM AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

APPELLATE SIDE. }

Civil Appeal No. 715 of 1908.

Custom—Succession—Alienation of gifted land—Brahmans of Mauza Charori, Dakhli Majara, Tahsil Nurpur, Kangra District—Hindu law not applicable.

Held, that Brahmans of *Mauza Charori, Dakhli Majara, Tahsil Nurpur, Kangra District*, are governed by custom in matters of succession and alienation, and not by Hindu law, and that by custom land gifted by one of them reverts to the donor's family on the death of the donee or of his male issue, in default of lineal descendants.

Held, also, that by custom the donee or his descendant has no right to make a gift of such land to a stranger.

Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 13th April 1908.

Sohan Lal, for appellants.

Sukh Dial, for respondents.

The judgment of the learned Judge was as follows :—

16th April 1909.

SHAH DIN, J.—The facts of this case are very fully stated in the judgments of the Courts below and need not be recapitulated.

The principal questions which have been argued before me in this appeal are : (1) whether the parties, who are Brahmans of *Mauza Charori, Dakhli Majara, Tahsil Nurpur, Kangra District*, are governed by Hindu law or custom in matters of succession and alienation ; and (2) whether if they are governed by custom, the land in dispute, which was gifted by Bishnu, ancestor of the plaintiff, to his son-in-law Reju, ancestor of Sundar, would revert on the death of Sundar in default of lineal descendants to the plaintiff in accordance with the rule of Customary law governing, in a matter of this kind, agricultural tribes in other parts of the Panjab.

I have heard arguments at some length on the two questions raised and have referred to the record, and the conclusions I

have come to are identical with those which the learned Divisional Judge has arrived at. I may at once clear the ground by observing that, in considering the question whether in regard to the matter in dispute the parties are governed by Hindu law or custom, the first Court has made an egregious blunder in thinking that the land in suit was given by way of *dharmarth* by Chhajju, ancestor of the plaintiffs, to the ancestor (Reju) of defendant No. 1 (Sundar). The fact, as proved by the extract from the history of the village given in the Settlement pedigree, is that six generations ago Chhajju (or Chalachhu), the founder of family No. 5, gave one *wand* or share of land by way of *dharmarth* to Bishnu, ancestor of the plaintiffs, and that the latter (Bishnu) gifted a half of that share to his own son-in-law Reju, ancestor of Sundar, defendant No. 1. The gift with which we are concerned in this case, is the one made by Bishnu to Reju, and not the one made to Bishnu by Chhajju by way of *dharmarth*. The whole of the reasoning of the first Court, therefore, in favour of the defendant, based as it is on the principle that under the Hindu law property given by way of *dharmarth* under no circumstances reverts to the family of the giver, falls to the ground, as being founded upon a wrong assumption of fact; while it is worthy of note that, apart from this erroneous supposition as to the nature of the original gift to Reju, the first Court does not at all attempt even a cursory consideration of the question of the parties being governed, not by custom, but by Hindu law, and has dismissed the plaintiffs' suit simply and solely on the ground that they have failed to prove a custom whereby the land in dispute once given away by their ancestor reverts to them.

Upon the first question I agree with the learned Divisional Judge in holding that the parties are agricultural Brahmans who have owned land for at least six generations, and who are, so far as the material before me throws any light on the matter, dependent for their livelihood wholly or almost wholly upon agriculture.

The appellants' pleader has not shown me that agriculture is not, or has not been, their main occupation; or that they derive a reasonable portion of their income from avocations, such as religious ministrations and the like, unconnected with the cultivation of agricultural land. There is no evidence at all on this point, for the simple reason that in the first Court it was not seriously pleaded by the defendants that they were not agricultural Brahmans though the plaintiffs clearly described themselves

in the plaint as zemindars by profession. The history of the village, to which allusion has been made above shows clearly enough that the parties belong to two leading families of the village, which appears to be inhabited by a compact community of Brahmans, who live upon agriculture as their principal ancestral profession, and who possess many of the characteristics of dominant agricultural tribes in the Kangra District, who follow agricultural custom to the exclusion of their personal law. That the parties are not governed by Hindu law is further shown by the fact that the defendants have pleaded in answer to the plaintiffs' claim that Mussammat Gulabi, defendant No. 3, has a right to succeed collaterally to the land in suit, a feature of Customary law as prevalent in the Kangra Valley and that in her presence the plaintiffs have no *locus standi* to sue. This plea has not been repeated before me, for the simple reason that the premise being granted the alleged conclusion by no means follows, as shown by the learned Divisional Judge; but the custom of collateral succession on the part of a widow is not denied, and the significance of the existence of this custom as strengthening the plaintiffs' position is obvious.

The appellants' pleader has relied on some recent decisions of this Court, notably *Gohra v. Hari Ram*, ⁽¹⁾ *Lachman Das v. Pahla Mal* ⁽²⁾ and *Hira Nand v. Hari Chand* ⁽³⁾ in support of his contention that the parties being Brahmans must be held to follow Hindu law and not custom. None of the decisions cited, however, is in point. The question before me is one which, as has been frequently observed by this Court, has to be decided with reference to the particular facts of the case in which it arises and with due regard to the material on the record. Judged by this test the peculiar features of each of the decisions quoted have to be borne in mind before attempting to apply to the present case the principle which it lays down, and having examined those authorities from that standpoint, I fail to see, how they help the appellants. The special facts of *Gohra v. Hari Ram* ⁽¹⁾ as stated at page 531 of the report, those of *Lachman Das v. Pahla Mal* ⁽²⁾ as noticed at page 297 (last paragraph), and those again of *Hira Nand v. Hari Chand* ⁽³⁾ as set out at page 569 (last paragraph), are sufficient to distinguish all those cases from the present one, and I need say no more than that they do not directly bear upon the question before me. On the other hand, I think that the circumstances of this case are very similar to those of

⁽¹⁾ 115 P. R., 1907.

⁽²⁾ 59 P. R., 1908.

⁽³⁾ 125 P. R., 1908.

Ram Chand v. Thakar Das ⁽¹⁾ (not cited by either side), and I hold, as the learned Chief Judge held in that case, that the parties before me follow custom and not Hindu law.

The second question need not detain us long. If the parties follow custom, I see no reason and none has been assigned by the appellants' pleader, why on the principle laid down in *Sita Ram v. Raja Ram* ⁽²⁾ the land in suit should not, upon the death of Sundar as representing the donee, and in default of his lineal descendants, revert to the plaintiffs as heirs of the original donor. If it would so revert, Sundar's interest in the land would be that of a limited owner not enjoying an absolutely free power of disposition, and the plaintiffs as entitled to reversion possess under custom the right to contest his power of making a gift to defendant No 4 (*Bhagwan v. Atru* ⁽³⁾) who, as I agree with the Divisional Judge in holding, has not been proved to be Sundar's stepson or adopted son. I dismiss the appeal with costs.

Appeal dismissed.

No. 88.

Before Mr. Justice Rattigan.

GOPAL DAS,—(PLAINTIFF),—PETITIONER,

Versus

HARI SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 388 of 1909.

Punjab Alienation of Land Act, XIII of 1900, sections 6 and 9—Mortgage by way of conditional sale—Reference to Collector futile after expiry of year of grace under Regulation XVII of 1806—Civil Courts have no jurisdiction to convert a mortgage by way of conditional sale into a mortgage prescribed by section 6 (1) (a) of the Act.

M. S. mortgaged the land in suit to G. for Rs. 500 on the 8th April 1896, redeemable within six years, otherwise the land to be considered as sold. On 31st August 1903 the mortgagee applied to the Collector and prayed that in lieu of the said mortgage by way of conditional sale, a mortgage of the kind recognised by section 6 (1) (a) of the Punjab Alienation of Land Act, 1900, might be granted to him for a period of 20 years. The Collector thereupon summoned the mortgagor and on his objecting to the change, the Collector recorded the fact of

⁽¹⁾ 94 P. R., 1907.

⁽²⁾ 12 P. R., 1892, F.B.

⁽³⁾ 20 P. R., 1904.

mortgagor's refusal and left matters in *status quo*. In June 1904 the mortgagee applied to the District Judge for issue of notice of foreclosure, who after referring to the proceedings before the Collector decided that a further reference to the Collector under section 9 (3) of the Punjab Alienation of Land Act was unnecessary and issued notice of foreclosure, which was duly served upon the mortgagor on 23rd June 1904. The mortgagor took no objection to this notice nor did he attempt to redeem the land. On 28th July 1906 the mortgagee instituted the present suit for possession as vendee, the year of grace having expired. The first Court found that plaintiff had duly complied with all the provisions of Regulation XVII of 1806 but held that plaintiff was not entitled to take possession as full owner, because no reference was made to the Collector under section 9 (3) of the Punjab Alienation of Land Act, and passed a decree for possession of the land as mortgagee for 20 years under section 6 (1) (a) of that Act, this decree was upheld by the Divisional Judge. On further appeal, the Chief Court—

Held that the year of grace prescribed by Regulation XVII of 1806 having expired and plaintiff having complied with all the provisions of the Regulation he was now suing for possession as full proprietor, there was no mortgage now in existence or "current" within the meaning of section 9 (2) of the Punjab Alienation of Land Act, so that even the Collector had now no power to interfere with the right of the *quondam* mortgagee.

Held, also, that Civil Courts have no power at all to convert a mortgage by way of conditional sale into a mortgage prescribed by section 6 (1) (a) of the Punjab Alienation of Land Act, this being a matter left entirely to the Revenue authorities.

Held, further, that the District Judge to whom application was made for issue of a notice of foreclosure under Regulation XVII of 1806 was right in not referring the mortgage again to the Collector under section 9 (3) of the Punjab Alienation of Land Act, it having already been before him and he having declined to take action in respect of it; that action on the part of the Collector being equivalent to his giving his sanction to the retention of the conditional sale clause.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated 6th April 1908.

Shadi Lal, for appellant.

Morrison, for respondents.

The judgment of the learned Judge was as follows :—

30th March 1909.

RAITIGAN, J.—The facts of this case, which are undisputed, are as follows :—

On the 8th April 1896 one Mehr Singh mortgaged the land in suit to Gopal, plaintiff, for Rs. 500, the conditions of the mortgage being that the mortgagor would pay interest at

Re. 1-6-0 per cent. per mensem, by annual payments, in default compound interest to be chargeable, and that the mortgage was to be redeemed within six years, otherwise the land to be considered as sold.

Nothing having been paid to the mortgagee, the latter, on the 31st August 1903, applied to the Collector and prayed that in lieu of the said mortgage by way of conditional sale, a mortgage of the kind recognised by section 6 (1) (a) of the Punjab Alienation of Land Act, 1900, might be granted to him for a period of 20 years. The Collector thereupon summoned the mortgagor to appear before him and carefully explained the position of affairs to him. The mortgagor, however, declined to grant a new mortgage, whereupon the Collector, obviously acting in accordance with the instructions contained in the Financial Commissioner's Circular No. 3482, dated 6th June 1903, recorded the fact that the mortgagor refused to give a new mortgage to the mortgagee and left matters in *status quo*.

In June 1904 the mortgagee applied to the District Judge for issue of a notice of foreclosure, and the District Judge after referring to the proceedings before the Collector above summarised, decided that a further reference under section 9 (3) of the Punjab Alienation of Land Act was unnecessary and directed that the notice of foreclosure should issue as prayed for. The notice accordingly issued and was duly served upon the mortgagor on the 23rd of June 1904. The mortgagor took no objection whatsoever to this notice, nor did he attempt to redeem the land.

The year of grace expired on the 23rd June 1905, and on the 28th July 1906, the mortgagee (who was out of possession) instituted the present suit in which he claims possession as *vendee*, the year of grace prescribed by the Regulation XVII of 1806 having elapsed.

The first Court found that the plaintiff had duly complied with all the provisions of the said Regulation, and that defendants' pleas as to the execution of the deed of mortgage and want of consideration were false. But it held that "plaintiff was not entitled to take possession as full owner because reference to the Collector under section "9 (3) of the Alienation of Land Act had not been made." It thereupon proceeded to hold that plaintiff was at most entitled either to have the condition of conditional sale

struck out, or to get possession as mortgagee under section 6 (1) (a) of the Act for 20 years. He therefore gave plaintiff a decree for possession of the land as mortgagee for 20 years.

This was a truly remarkable decision. Whatever powers may be given to a Deputy Commissioner under section 9 (2) of the Act, I know of no provision of law which enables a Civil Court to interfere, *suo motu*, with mortgages of the kind now in question in such a manner as to usurp powers given by the Legislature to the Revenue authorities, and to convert a mortgage by way of conditional sale (against the wishes of the mortgagee) into a mortgage of the kind prescribed by section 6 (1) (a) of the Act. But curiously enough this extraordinary decision was upheld by the Divisional Judge. Obviously, if Courts below were of opinion that the foreclosure proceedings were invalid by reason of the omission on the part of the District Judge to refer the case to the Collector, when application was made to that officer in June 1904 for the issue of a notice of foreclosure, their proper procedure would have been to refer the matter then pending before them to the Collector for action under section 9 (2) of the Act. I cannot see how it was in any event open to them to exercise the functions of the Collector under that section and to alter the nature of the mortgage as they have done in this case.

But I need not labour this point, as in my opinion, the view taken by the Courts below is entirely erroneous.

Plaintiff is now suing as a vendee for possession, and the sole point before the Courts is whether the foreclosure proceedings were or were not in order. It seems to me quite immaterial whether or not the District Judge when he issued the notice of foreclosure acted in contravention of the provisions of section 9 (3) of the Punjab Alienation of Land Act. Assuming that he did so, the fact remains that so far as the Regulation of 1806 is concerned (and this Regulation stands unrepealed), the notice was perfectly good, and it is found by both Courts that there is no flaw in the foreclosure proceedings.

In these circumstances what power have the Courts in the present suit, when plaintiff's right has, by the expiry of the year of grace, matured into ownership, and there is no longer any mortgage subsisting, to take exception to his title on the ground that the District Judge should have made a

reference to the Collector before issuing the notice of foreclosure? The action they have in fact taken is clearly *ultra vires*, but that objection apart, what right would they have in a case of this kind to take action under section 9 (3) of the Act? The suit is not based on a mortgage; it is based on a title *aliunde*; and as the mortgage no longer exists, any reference to the Collector in the present suit would necessarily be infructuous as there is no mortgage "current" within the meaning of section 9 (2). It was obviously for this reason that the Courts below refrained from making this futile reference, and arrogated to themselves the powers conferred by the Legislature only on the Revenue authorities, but if the Collector himself has now no power to interfere with the rights of the *quondam* mortgagee, the Civil Courts *a fortiori* have still less right to do so.

On this ground alone, the orders appealed from should be set aside. But there are other objections to those orders. In my opinion, the District Judge was perfectly justified in June 1904 in deciding not to refer the matter of this mortgage to the Collector. He did not overlook the provisions of clause (3) of section 9 of the Act. On the contrary he very carefully perused the file of the Collector's proceedings, and it was only after he found that the Collector had had this mortgage brought to his notice and had been obliged, owing to the position taken up by the mortgagor, to refrain from taking action under clause (2) of the said section, that he decided that further reference to the Collector was uncalled for. It has been held by a Division Bench of this Court in Civil Revision No. 1426 of 1905, that "the Deputy Commissioner though empowered to interfere under "the second sub-section of section 9 is clearly not obliged "to do so", and that it is competent for him, if he so thinks fit, to decline to take action under that sub-section and to relegate the parties to their original position under the mortgage-deed. And the opinion was expressed that if in any case of this kind the Deputy Commissioner declines to take action under the said sub-section, he impliedly sanctions the retention in the mortgage of the conditional sale clause. This opinion was approved by another Division Bench in the case reported as *Bichha Lal v. Gumani* (1).

Now it is clear that a mortgage by way of conditional sale effected before the passing of the Act can under section 9 (2)

(1) 93 P. R., 1907.

come under the consideration of the Deputy Commissioner in three ways. He may himself discover its existence, or one of the parties (or both of them) may bring it to his notice; or lastly, it may be referred to him by the Civil Court under sub-section (3) of section 9. Obviously, the intention of the Legislature was that in any event, such a mortgage should be brought to the notice of the Deputy Commissioner. But I cannot believe that it was intended that the Civil Courts should be bound to refer the mortgage to that officer in a case in which it is proved that he had already had it before him and had declined to take action in respect of it. Sub-section (3) of section 9 expressly states that the reference by the Civil Courts is to be "with a view to the exercise of the power conferred by the sub-section applying thereto." If he has already declined to take any action under that sub-section and *has thereby given his sanction to the retention of the conditional sale clause*, what possible object can there be in insisting on the Court's obligation to make a further and wholly fortuitous reference to him?

The difficulties heretofore experienced in cases of this kind have been met by the addition of clause (4) to section 9 of the Act,* but this new clause has no application to the present case, and I need not further refer to it.

For the reasons given I accept this appeal, and, setting aside the decrees of the Lower Courts, I grant plaintiff the decree prayed for with costs throughout.

Appeal accepted.

No. 89.

Before Mr. Justice Johnstone and Mr. Justice Rattigan.

PURAN CHAND,—(PLAINTIFF),

versus

CHUHAR AND KANHAYA,—(DEFENDANTS).

Civil Reference No. 73 of 1908.

REFERENCE SIDE. }

The Indian Oaths Act, X of 1873, sections 8, 9 and 10—Local Commissioner cannot administer oath.

Held, that it is not competent to a person who has been appointed a local commissioner for the purpose of recording evidence in a case to administer an oath to one of the parties in the circumstances referred to in sections 8, 9 and 10 of the Indian Oaths Act, 1873, he not being a "Court" within the meaning of those sections.

* See Punjab Act I of 1907, s. 8.

Case referred by T. P. Ellis, Esquire, District Judge, Hoshiarpur District, with his letter No. 401, dated the 21st November 1908.

The order of the Court was delivered by—

RATTIGAN, J.—This is a reference under section 617 of the 26th April 1909. Civil Procedure Code, of 1882, and the question upon which we are asked to give our opinion is whether it is competent to a person who has been appointed a local commissioner for the purpose of recording evidence in a case to administer an oath to one of the parties in the circumstances referred to in sections 8, 9 and 10 of the Indian Oaths Act, 1873. In our opinion the answer to this question must clearly be in the negative. In section 4 the Act provides that certain Courts and persons are authorised to administer oaths and affirmations, but in sections 8—12, which deal with a very special subject, reference is made only to “the Court,” and we think that the power to administer oaths of this very special kind was intended to be strictly confined to Courts as distinguished from “persons having by law or consent of parties authority to receive evidence” (section 4 (a) of the Act).

A local commissioner may be “Court” within the definition of that term in the Indian Evidence Act, 1872, but inasmuch as the Oaths Act draws a distinction between “Courts” and “persons authorised to take evidence” and as sections 8—12 of the latter Act refer specifically to Courts as distinguished from such other persons, we are of opinion that the expression “Court,” as used in those sections, means a Court as established by law and does not include persons who are not “Courts” but are authorised to take evidence.

With this expression of our opinion, we direct, that the file be returned to the District Judge for disposal of the appeal in accordance therewith and with law.

Full Bench.

No. 90.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Reid,
Mr. Justice Robertson, Mr. Justice Kensington, Mr.
Justice Rattigan, and Mr. Justice Shah Din.*

SANWAL DAS,—(PLAINTIFF),—APPELLANT,

versus

GUR PARSHAD,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 827 of 1907.

Pre-emption—Sale of several houses adjoining one another—Suit by owner of a house adjoining one only of the houses sold—Defence by vendee—Meaning of word “adjacent”, Punjab Pre-emption Act, 1905, section 13 (7) discussed.

Held by Full Bench—Chatterji, Rattigan and Chevis, JJ. (Chevis, J., dissenting) that when two houses which adjoin one another are sold jointly, the right of pre-emption of the owner of a house which adjoins only one of the two houses sold extends to that one house only and not to both the houses sold.

The meaning of the word “adjacent” in Punjab Pre-emption Act, 1905, section 13 (7), discussed.

Held by Full Court (Robertson and Rattigan, JJ., dissenting) that where on such a sale, the owner of the adjoining house sues for pre-emption in respect of the one of the two houses sold to which his right extends, the vendee is not entitled to say that by reason of his having under the sale-deed become owner of the other house he stands on an equal footing with plaintiff (both being owners of adjoining houses) and that the plaintiff cannot, therefore, pre-empt the house adjoining his own.

Bhagwan Das v. Mohan Lal ⁽¹⁾ and *Ram Hit Singh v. Narain Rai* ⁽²⁾ dissented from.

Darehan Khan v. Sohaura Mal ⁽³⁾ overruled. ✓

Uttam Chand v. Lahori Mal ⁽⁴⁾ approved of.

Appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 18th May 1907.

Harris and Sheo Narain, for appellant.

Shadi Lal, for respondent.

⁽¹⁾ I. L. R., XXV All., 421.

⁽²⁾ I. L. R., XXVI All., 389.

⁽³⁾ 124 P. R., 1907. ✓

⁽⁴⁾ 112 P. R., 1907.

The order of the Division Bench referring case to a Full Bench was as follows:—

CHEVIS, J.—The plan is given on page 7 of the paper book. *27th May, 1904.* The property sold consists of houses B and C and two other houses situated elsewhere and some jewelry. Sanwal Das sues as one of the co-owners of house A to pre-empt house B.

The District Judge held that as houses B and C adjoined one another and as house B adjoined house A both B and C must be regarded as property adjoining A, and that a suit for B alone would not lie. The Divisional Judge did not agree with this, but held that the suit must be dismissed for another reason, *viz.*, that as the vendee was now owner of house C he was also at date of institution of suit owner of property adjoining B, and so that plaintiff had no preferential right existing at time of suit to pre-empt B.

Plaintiff appeals, urging that both the above reasons for dismissal of suit are wrong; the vendee urges that both reasons are right. In the first place I note that in another suit the owner of house D has sued to pre-empt C. That case has also come before us in appeal (Appeal No. 790 of 1907), and I have just recorded a judgment in which I have come to the finding that the claim should be dismissed, if my learned brother concurs, vendee will now rank as undisputed owner of house C, but if the owner of house D succeeds in his appeal I doubt if the Divisional Judge's reason for dismissing the suit can be upheld. For, if C is wrested from the vendee by pre-emption, I do not think he could in this suit sustain a counter-claim as being an owner of adjoining property.

I will first consider the reason given by the learned District Judge for dismissing the suit. He considers that when a claim is brought by reason of contiguity the right to pre-empt extends as far as the property sold is not separated by any intervening space or other property. According to this if a man sold a line of houses, a person owning a house adjoining at one end would have to sue to pre-empt the whole line. The learned Divisional Judge, however, thinks that if the houses are treated as distinct properties in the deed of sale, the plaintiff is only bound to pre-empt the house immediately contiguous to his own.

Both the lower Courts have discussed the question of a vendor being able to defeat pre-emption, but I do not think such a discussion is of any use. It seems to me obvious that in certain cases pre-emption can be defeated. Take for instance, the case

of a man owning three or four houses bounded on the north and east by public streets. He may first sell the north-east house which is bounded on north and east by streets and on south and west by the other houses of his own, no one can pre-empt so far. The next day he may sell the rest of his houses to the same vendee, who in a suit for pre-emption can urge, "I am an owner of adjoining property as much as any one, every house I bought on the second day directly adjoins the house I bought on the first day."

Now a house does not always remain a house, alteration of structure may make it into two houses or may include it in the adjoining house. When a man sells two or more adjoining houses no doubt he names the houses as so many houses in the sale deed; he probably gives the separate numbers which each house has in the municipal register, *khasrabandi* or similar document, and he may give the separate boundaries of each house, especially in a town like Delhi where sale-deeds are commonly drawn up with such wealth of detail. But does that make each house a separate property for purposes of pre-emption? Not, in my opinion. The doctrine of pre-emption in towns by reason of contiguity seems to me to be, that a man has a right to prevent a stranger being brought in as his next door neighbour. If houses A, B, C, D, and E all adjoin in a line and the last four are sold, how can the owner of A avoid having a stranger as next door neighbour if he is allowed to pre-empt B alone? The stranger will still be his next door neighbour if he is allowed to retain possession of C; again, if description in the plaint is to be the guide as to what are separate properties, it lies on the vendor and vendee as to how far the neighbour can pre-empt, for the deed may be so worded as to describe simply those rooms immediately adjoining the pre-emptor's house as separate properties. Take again the case of a man selling fields. Under the old law a man could sometimes claim to pre-empt by reason of a special custom entitling him as owner of adjoining fields to pre-empt. The sale-deed would usually give the *khasra* numbers. Could he only claim to pre-empt the *khasra* number sold which immediately adjoined his own land? Could he not rather say he claimed to go on and pre-empt so much land as lay in a ring fence adjoining his own? Two fields may at any time be thrown into one or subdivided into more than one and *khasra* numbers are subject to change at least at every settlement. In my opinion wherever the right of pre-emption depends on contiguity, a plaintiff can

claim to pre-empt so much as lies in a ring fence adjoining his own property; he is only stopped when he comes to something which is entirely cut off from his own property by reason of property intervening which, whether it belongs to the vendor or to any one else, is not included in the sale-deed. If the vendor or vendee were to raise the plea "the two houses are described as separate properties in the sale-deed and so you can only pre-empt the one immediately adjoining your own." Surely it would be a good and sufficient answer for the plaintiff to reply "You have chosen to join the two houses in one sale, and you cannot, therefore, object to their being regarded as one property for purposes of my suit." In my opinion, therefore, the plaintiff in this case could and should have sued to pre-empt both the houses, they being contiguous to one another and one being contiguous to his own. Then as to the second plea that the vendee is also by the very sale an owner of adjoining property and so has rights equal to that of plaintiff as regards house B. This seems directly opposed to what was held in *Uttam Chand v. Lahori Mal* (1). But it seems to me that that ruling overlooks the difference between the position of a plaintiff and that of the vendee in a pre-emption suit. This difference has been well brought out in *Darehan Khan v. Sohaura Mal* (2). The plaintiff, to succeed, must have a right to pre-empt existing both at time of sale and also at time of suit. The vendee may defeat it by showing either that plaintiff has lost his superiority between these periods or that he (the vendee) has between these periods improved his position and was at date of suit in as good a position as the plaintiff. The plaintiff, on the other hand, cannot get a decree by showing that the vendee has lost his superiority between these suits; see *Muhammad Nawaz Khan v. Mussammatt Bobo Sahib* (3). In my opinion the correct way of stating the matter would be that plaintiff must prove a superiority existing from the moment prior to sale, to the time of institution. I fail to see any hardship to the plaintiff if my view be correct. In my opinion the plaintiff can pre-empt as regards the whole where the property sold is in a ring fence. So that the pre-emptor could not defeat such a claim by saying "I also am now by the very sale in question an owner of adjoining property." If plaintiff does not claim as much as he might, I think the pre-emptor can fairly say: "You have sued for less than you could and even if that were not a sufficient reason for dismissing

(1) 112 P. R., 1907.

(2) 124 P. R., 1907.

(3) 44 P. R., 1903.

“your suit, you are now on no better footing than I, as now “we are both owners of adjoining property.” If a vendee can resist a claim to pre-empt either by reason of a purchase prior to, or of one subsequent to, the purchase in dispute, I fail to see why he cannot resist it by reason of rights acquired under the very sale in question. Suppose, for instance, a custom whereby an owner of land could pre-empt a house in the same village, and suppose there was no custom of pre-emption as regards land, I take it that a man who had bought a house could resist a claim to pre-emption, if at any time prior to institution of suit he had become an owner of land. He might have bought the land either before or after he bought the house and according to my view he might have bought both land and house by one and the same sale-deed. The facts would in either case be the same, *viz.*, that at the date of institution of suit he was on as good a footing as the plaintiff. Then as to a plea which has been raised that houses A and B have a common entrance. This seems to have been raised for the first time in arguments in the Divisional Court. It is not supported by the plan put in by plaintiff, and it seems somewhat late now for plaintiff to challenge the correctness of his own plan. As to one house being servient to the other there is no proof at all of this on the record. Lastly, I would remark that though this judgment is opposed to *Uttam Chand v. Lahori Mal* (1) I would, with all respect to the learned Judges, point out that that judgment, though it mentions the plea “that plaintiff “must take the whole bargain or nothing,” as one of the points to be decided does not (in my humble opinion at least) decide this plea satisfactorily. The decision on this point is given in the penultimate paragraph of the judgment. It refers to Explanation I to section 106 of Rattigan's Digest and rulings quoted there. The explanation only lays down that a pre-emptor is not bound to claim the whole when his right of pre-emption extends only to a part. Quite so; but the question still remains whether, with reference to clause seventhly of section 13, the plaintiff has a right to pre-empt both houses, and the answer to this question seems to me to have been assumed rather than reasoned out in *Uttam Chand v. Lahori Mal* (1). The rulings quoted under the Explanation have all been referred to by me; they are all rulings under the Punjab Laws Act and none of them in my opinion throw any light on the above

(1) 112 P. R., 1907.

question. I would uphold the decree of the lower Courts and dismiss the appeal with costs.

CHATTERJEE, J.—I regret my inability to concur with my 31st May 1908. learned brother on either of the points which he has decided against the plaintiff-pre-emptor.

I am on the whole not prepared to agree that houses B and C are one and that the claim of the owner of house A extends to both on the ground of adjacency. It is undeniable that house A is not adjacent to C taking "adjacent" to mean contiguous or adjoining as my brother has done, for otherwise much of his argument on this head seems superfluous. The adjacency can exist only if A and B are treated as a single house or property. There is nothing to show that they are. They are distinct houses with distinct boundary walls opening on different streets and have no passage or means of egress into each other. They must be separately possessed and occupied as they are at present constituted and what is most important have been treated by both the vendor and vendee as distinct houses and have been so described with the separate boundaries of each in the deed of sale from which the suit takes its rise.

If they are separate houses the argument of contiguity must fail altogether, and the only apparent ground for treating them as one is that they are comprised in the same bargain. But admittedly this by itself is not a sufficient reason, for there are other houses situate at a different place to which the argument does not apply. I hold that in deciding whether the houses are one or not for purposes of pre-emption, we must take words in their ordinary sense and look to the action of the parties to the sale and above all to the deed by which the transaction was effected. It is clear therefrom that the parties treated the houses as distinct and the case ought to be dealt with on that footing in the absence of cogent reasons to the contrary.

If "adjacent" in clause 7 of section 13 of the Punjab Pre-emption Act means simply "near" the question of the separateness of the house need not arise, but this interpretation has not been urged anywhere except at the close of the argument of appellant's counsel. If it is to be taken into consideration, there is nothing to show up to what distance a house may be considered adjacent to another in order to give rise to the right of pre-emption, and the point cannot and ought not to be decided against the plaintiff-respondent without further enquiry, but there is no case nor proposal for such inquiry at this stage. There is *in fact* no ring fence in which the houses

B and C may be held to be enclosed. By contiguity I would understand contiguity in space and not otherwise.

My brother's argument about the sale of several fields at one place does not to my mind carry the matter much further. In the first place the *khasra* numbers are not really distinguishing marks like enclosures or raised boundary walls but rather marks of identification on the village *shajra*. When a plot of land comprising several *khasra* numbers is sold people understand that the whole land as a block is sold. The illustration appears to me not to be very apposite, and if we postulate all the circumstances requisite to make it analogous to the present case, I think the difficulty remains precisely where it is in the latter.

The learned Divisional Judge takes the same view and the reasoning of the learned Judges who decided *Uttam Chand v. Lahori Mal* (1) entirely supports it. I have refrained therefore from giving my reasons at length.

As regards the second point, I am still less able to accept my brother's conclusions. Speaking generally, I agree that a pre-emptor is bound to show that he was clothed with the right at the date of sale and also at that of suit and up to the time of the final decree or should have his claim dismissed. This is all, I think, that has been affirmatively laid down by the previous rulings of this Court, and the Allahabad Court with one exception to which I shall presently refer. If the pre-emptor loses his right within the period mentioned above whether by his own act or from causes beyond his control, his suit fails. But this is very different from saying that he may retain his rights intact, but may lose his suit nevertheless in consequence of the vendee improving his position to an equality with, or a superiority over him, after his cause of action has accrued and is sought to be enforced in Court. For the latter position there is, I think, no direct authority except the ruling already mentioned, *viz.*, *Daruehan Khan v. Sohaura Mal* (2). To my mind this is going too far, for the ordinary rule is, that a person is not affected by anything that has transpired after his cause of action has arisen and his suit instituted. The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end, but I have great difficulty in understanding how his position can be changed for the worse by the vendee bettering

(1) 112 P. R., 1907.

(2) 124 P. R., 1907.

himself by acts subsequent to the institution of the suit. The right is in essence, one to take advantage of a contract of sale of immovable property between two other persons and to be substituted as vendee in place of the vendee in the contract. Section 4 of the Pre-emption Act does not lead to a different conclusion. The rights to be adjudicated upon are those existing at the time of the accrual of the cause of action subject only to the plaintiff being required to show that he is still possessed of the rights on the infringement of which his suit is based, and no improvement of the vendee's position at a subsequent period can have any bearing on the points in issue. The peculiar nature of the right of pre-emption justifies the greater stringency adopted about the pre-empting plaintiff's possession of the right up to time of decree, but apart from this, he is in the same position as any other plaintiff. To hold otherwise would appear to me to be reducing the right of pre-emption to a delusion and a snare.

It is possible that we are drifting to the position taken up in *Darehan Khan v. Sohaura Mal* ⁽¹⁾, though with great deference to the learned judge who decided it, I think the rational trend of authority has not gone so far. If therefore my learned colleague is unable to agree with me, I would propose a reference to a Full Bench to define the exact position of a pre-emptor in respect of the matter we are considering.

I am also unable to agree with my learned brother that the vendee can rely on his ownership of house C under the purchase to set up an equal right of contiguity with the plaintiff. I confess, I cannot well understand the reasoning on which such a contention is based. Plaintiff's complaint is that the vendor was bound to sell B to him and that its sale to the vendee constituted a breach of his right and gave him a cause of action. How can a sale of C simultaneously with B to the vendee clothe him with rights equal to those of the plaintiff, so that he can say the vendor was equally bound to sell B to him as a contiguous owner. He derives his title from the very sale which infringes the plaintiff's right. I agree with the view taken of this point in *Uttam Chand v. Lahori Mal* ⁽²⁾ and therefore need not enlarge on it any further.

⁽¹⁾ 124 P. R., 1907.

⁽²⁾ 112 P. R., 1907.

Order.

1st June 1902.

CHEVIS, J.—I am exceedingly sorry that I find myself still of the same opinion, at least as regards the question whether the owner of house A cannot claim to pre-empt both the houses, and I agree with my learned brother in referring the case to a Full Bench. The points involved are of importance, and I think this is a suitable opportunity to test the correctness of the two rulings—*Uttam Chand v. Lahori Mal* ⁽¹⁾ and *Darehan Khan v. Sohaura Mal* ⁽²⁾

The two points for determination are—

- (1) When two houses which adjoin one another are sold jointly, does the right of pre-emption of the owner of a house which adjoins only one of the two houses sold, extend to both of the houses?
- (2) If the answer to the first question be in the negative, is the vendee entitled to say that by reason of his having, under the sale deed, become an owner of adjoining property, he stands on an equal footing, so that the pre-emptor cannot pre-empt even the one house adjoining his own?

I would add that in this particular case it seems to me unnecessary to discuss the difference of the two words 'adjacent' and 'adjoining,' for in this case house A actually adjoins house B and house B actually adjoins house C, and it has not been contended that C is adjacent to A.

As regards the second point I should like to hold that any improvement in the status of the vendee subsequent to the sale should be disregarded, so that a pre-emptor, who could prove that his right was preferential to that of the vendee up to the time of sale and that his position had not deteriorated subsequent to the sale, should succeed. But unless this can be held (and I am very doubtful, if it would be correct so to hold) I fail to see that it makes any difference whether the improvement in the status of the vendee takes place after the sale or by the sale deed itself.

As regards point 1, with all possible deference to my learned colleague and to the learned Judge who delivered judgment in *Uttam Chand v. Lahori Mal* ⁽¹⁾ I still find myself unable to agree. The case is accordingly referred to a Full Bench.

(1) 112 P. R., 190.

(2) 124 P. R., 1907.

CHATTERJEE, J.—I agree to the foregoing points being referred 1st June 1908. to a Full Bench.

The order of the Full Bench referring a question to the Full Court.

RATTIGAN, J.—The facts of the case are stated fully in the 23rd July 1908. judgments of the learned Judges who heard the case as a Division Bench. The two questions referred to the Full Bench are these:—

(1) "When two houses which adjoin one another are sold jointly, does the right of pre-emption of the owner of a house which adjoins only one of the two houses sold, extend to both of the houses?"

(2) "If the answer to the first question be in the negative, is the vendee entitled to say that by reason of his having under the sale deed become an owner of adjoining property, he stands on an equal footing, so that the pre-emptor cannot pre-empt even the one house adjoining his own?" Upon the first question I deprecate laying down any general rule. The claim in the present case is based on section 13 (7) of the Punjab Pre-emption Act, 1905, and I find that the right of pre-emption given under that clause is one given to the person where immoveable property is adjacent to such property. In the present case and upon the particular facts of the case I agree with my brother Chatterji, that house C is not adjacent to house A. No doubt it adjoins house B which in turn adjoins house A, but I cannot agree that it must, for this reason, be held to adjoin house A. The word "adjacent" does not primarily mean "adjoining." Its primary meaning is "lying close to" (*ad ; jacesse* = lying towards); but while I am not disposed to disagree with my learned brother that the ordinary meaning of the expression in section 13 (7) of the Act must be taken to be "adjoining," I would not so restrict the meaning of that term in all cases. There may be cases where a person whose immoveable property is not actually adjoining, may nevertheless be entitled to claim pre-emption under that clause. In the present case, however, I entirely accept my brother Chatterji's arguments on this point, and for the reasons given by him, as also for the reason given in *Uttam Chand v. Lahori Mal* (1), I would hold that the plaintiff was not compelled to sue for pre-emption of

(1) 112 P. R., 1907.

the house C; he not having, in my opinion, the right to make such claim.

The second question is far more difficult. But after giving it my best consideration I am of opinion that it must be answered in the affirmative.

The case is this.—A buys two houses B and C, by one sale deed, these two houses adjoin each other.

X has, for some time prior to this sale, been owner of house D which adjoins house C. X sues to pre-empt house C. To this claim A replies :—

“ By the very sale deed by which I purchased house C, I became owner of the house B, which adjoins house C. As regards house C, therefore, I was in exactly the same position as the claimant at the time when his alleged cause of action arose, that is to say, I was at the date of sale an owner of immoveable property adjacent to the property claimed.”

In my opinion, given with all due deference, A's reply is a complete defence. It is admitted that if A had bought house B five minutes before he purchased house C, his position would be impregnable. This proposition is conceded. There is also ample authority for the proposition that if A had, prior to the institution of a suit by X, sold the house C to a person who had a superior right to, or even an equal right with, X, the latter's claim must fail, (*see* the authorities cited at p. 38 of Mr. Shadi Lal's "Pre-emption Act," 2nd Edition). Further, there is good authority for the view that the vendee can defeat X's right by himself purchasing, subsequently to the date of the sale of the property in dispute, property from a person who by virtue of such property has an equal right of pre-emption with X, *Bhagwan Das v. Mohan Lal* ⁽¹⁾ and *Ram Hit Singh v. Narain Rai* ⁽²⁾. It is said that in this latter event the vendee puts himself merely in the position of the former owner of that property. Admitting that this is so, I fail to see why he cannot put himself in such position by buying that property simultaneously with the property in dispute; but be this as it may, we have it established that the vendee can defeat X's claim by purchasing other property (which puts him on a level with X) either immediately before or immediately after the sale to him of

⁽¹⁾ I. L. R., XXV All., 421.

⁽²⁾ I. L. R., XXVI All., 389.

the property in dispute. Is it logical to say that though he can so defeat X's claim, he cannot defeat it by buying such other property simultaneously with the property in dispute? I confess I am not myself able to appreciate the difference. It is urged, however, that the pre-emptor X has a right to claim the property sold, and that this right exists in a *potential* form (whatever that may mean) prior to the sale to the vendee and that such sale is a violation of this right. I cannot admit the correctness of this proposition. The right of pre-emption, as defined in section 4 of the Act, means the right to acquire property *in preference to other persons* and it arises in respect of such property only in the cases of sales, etc. Section 18, in order to further elucidate this point, enacts that any person entitled to a right of pre-emption may, when the sale has been completed, bring a suit to enforce that right. Clearly, then, no person can be said to have a right to claim pre-emption until a sale has taken place, nor till then has he any cause of action against any one. He may have a *possibility* to claim that right, but until a sale has taken place, how can he possibly affirm that he has an actual legal right to claim pre-emption? The vendor may not sell at all, and even if he does sell, it may be to a person who has a superior right to, or at least stands upon exactly the same footing as, the would-be pre-emptor. Until then the sale has actually taken place, and until the identity of the vendee is disclosed, it is impossible for X to say that he is entitled to pre-empt. And section 18 of the Act makes it perfectly clear that it is only when the sale has been completed that his cause of action accrues. But if that is so, how can X claim to pre-empt property from A if the latter immediately on the sale of such property to him becomes also owner of other property which puts him *ipso facto* on a level with X? It is said that A, by purchasing the latter property together with the property claimed by X, cannot be said to be entitled to *pre-empt* the latter, in as much as an owner cannot pre-empt his own property. But this argument is beyond the point. A does not claim to be a pre-emptor. What he says, *in answer to X's claim*, is this: "at the time when I bought house B, I was *codem-ictu* the owner of immoveable property adjoining house B which you claim. Your claim to pre-emption in respect of house C accrued only when I had, at the same time, become owner of house B and was, therefore, in exactly the same position as you were in." To my mind this is a complete answer to the claim. Arguments *at inconvenienti*

have, as usual, when claims are inherently weak, been urged, but apart from all other objections to this, I cannot see how they can carry weight when it is once admitted (as it has been throughout the argument) that A could have successfully defied X by buying the two properties even on the same day, provided he had purchased property C by a deed of sale executed one minute prior to the execution of the deed of sale in respect of house B.

There is one argument in support of the contention that a right of sale exists prior to a sale, to which I must advert. It is based upon the provisions of section 16 of the Act which provides that when a person proposes to sell he may give notice to all such persons as have a right of pre-emption. Now it is to be noticed that the person proposing to sell is not bound to give this notice. He may do so if he likes, but there is no obligation on his part, and if he omits to give such notice, I cannot think that any person could, with success, claim damages against him or the vendee. But it is urged that from the words used in this section, the inference is that a person has a right of pre-emption even prior to the completion of a sale. I do not agree. What the section obviously means (and it must be read with sections 4 and 18 of the Act) is that when a person is thinking of selling his property to A, and he knows that if he does sell his property to A, X will be entitled to claim pre-emption, he may, if he so pleases, ask X if he wishes to purchase the property. But this does not mean that X has a right, potential or otherwise, to claim pre-emption before the sale takes place. To hold that, would be to ignore the very definition of the right and the provisions of section 18, as well as to deprive the person proposing to sell of his undoubted right not to carry his intention out.

A further argument against the present claim is, that the vendee at the time of the *institution of the suit* was undoubtedly an owner of a house adjoining the house in suit, and, therefore, in as good a position as the plaintiff. This is, no doubt, merely another way of looking at the same question, but the argument is supported by numerous authorities. It is true that the vendees in these cases acquired the other properties, which give them an equal position with the plaintiff, subsequently to the date of the original sale. But *à fortiori* I would hold that the vendee cannot be defeated if he acquires such other property at the very time when he buys the property sought to be pre-empted.

My view then is, that X has no cause of action until the sale actually takes place. Till then, he has no right whatsoever for the simple reason that until the sale is completed it cannot be said that he has a preferential right to that of the vendor. But when the sale is completed, A is, *ipso facto*, in exactly the same position as X. They are both owners of adjacent properties and that being so, X has no preferential right over A. This to my mind is a stronger case than that in which, subsequently to the sale (*i.e.*, after X's cause of action has already arisen), A by a subsequent purchase of other property, has been held to be entitled to defeat X's right. *Janki Prasad v. Ishar Das* ⁽¹⁾, *Bhagwan Das v. Mohan Lal* ⁽²⁾, *Ramlal Singh v. Narain Rai* ⁽³⁾. For the reasons given I would reply to the first question in the negative and to the second question in the affirmative.

CHATTERJI, J.—My learned brother Rattigan has agreed with me on the first point referred to the Full Bench. I have already given my reasons in my previous order and have nothing to add to them, and I concur in the reservation made by him.

26th July 1908

I regret that after carefully perusing my brother's judgment on the second point, I am unable to agree with the answer he proposes to give and adhere to the opinion I expressed in my former order. I do not consider it necessary to enter into an elaborate criticism of the grounds given by him for his conclusion but think it sufficient to re-state my own for holding the contrary view.

I consider that the right of pre-emption is a substantive and primary right which is possessed by, or inheres in, the pre-emptor and imposes a corresponding obligation in the vendor of the property which is the subject of pre-emption. I use the word pre-emptor to denote the person who would be entitled to claim pre-emption under the law applicable in order to avoid circumlocution and the word vendor also in the same way. The limitations of this right are many, and it comes into play or arises only on the happening of a certain contingency. Thus it may be termed potential, for want of a better expression, and become actual when the necessary contingency has come into existence.

My brother Rattigan thinks that there can be no actual legal right until a sale has taken place and that to a vendee over whom the pre-emptor is entitled to preference, and on this ground

⁽¹⁾ I. L. R., XXI All. 374.

⁽²⁾ I. L. R., XXV All. 421.

⁽³⁾ I. L. R., XXVI All. 389.

would place the purchasers of house B by virtue of the sale of that house to him on an equal footing with the claimant for pre-emption of house C by reason of being the owner of the adjoining house D, see illustration given by my brother at an earlier stage of the judgment. With all deference to my learned brother I demur to this conclusion.

In spite of the limitations and peculiarities attaching to the right of pre-emption it is to my mind a right in the strictest finistic sense possessing all the qualities and incidents of a legal right. A legal right is defined by Professor Holland "as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others" (*Jurisprudence*, 5th edition, chapter VII, *Rights*, p. 71). At p. 73 he gives a further explanation of right by drawing distinctions between the might, moral right and legal right of a person and says: "If irrespectively of his having or not having, either the might or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order, that his wishes may be so carried out, then he has a legal right so to carry out his wishes."

Sir William Rattigan in his treatise on *Jurisprudence* accepts the definition of Professor Holland and says: "And in this sense it (right) may exist without being exercised, consciously or unconsciously."

The elements of a right consist according to Professor Holland of—

- (1) A person entitled whom he calls the person of inherence.
- (2) In many cases an object over which the right is exercised.
- (3) The act or forbearance which the person in whom the right resides is entitled to exact.
- (4) The person obliged or the person from whom these acts and forbearances are exacted, whom he calls the person of incidence. (pp. 78, 79).

Now if we apply these tests, it seems obvious to me that the pre-emptor has the capacity of controlling the action of the vendor in selling the property which is the object of the right and of compelling sale to himself and that he has the assent of the State and can claim its assistance through the Courts in exercising that control. He has this right of control at all times. and

that the right of claiming that the sale be made to himself arises only when the vendor sells, does not derogate from the character of the right as a legal right. The right is dormant or potential until the vendor sells of his own motion, but, nevertheless, the right exists as Sir William Rattigan says "without being exercised." It is best understandable where it exists solely in one person as the existence of many persons having similar rights of greater, equal or less strength in respect of the same property is calculated to confuse the clear appreciation of its nature. It does not, however, make any difference in principle, and for the proper exposition of a legal notion, it is best to take a typical case free from minor complications. In most instances the right exists in more than one person, but the analysis of the right is the same in the case of all, and the only additional element is the priority *inter se* among such people which may be due to a variety of causes. The right exists and comes into operation in the case of each pre-emptor on the completion of the sale, though in the completion *inter se* among them, the rights of some may be overborne by those of others. Here as far as the record goes, there was only one person possessed of the right of pre-emption, *vis.*, the plaintiff, leaving of course the defendant-vendee whose claim is the subject of discussion. That the right exists though in a dormant state in the pre-emptor *before* the sale of the property, subject to pre-emption, takes place is to my mind clear from the fact that he is able to exercise it and to claim the sale to himself as soon as the sale is effected whereas no other person (*i.e.*, not a pre-emptor) is able to do so. What is the reason for the difference in the relative positions of a pre-emptor and a non-pre-emptor with respect to sale? The answer, in my opinion, can only be that the former was in possession of something *before* the sale which enables him to control the action of the seller and which the latter has not. This something was the right of pre-emption, a right doubtless of a limited character dependant on certain contingencies and almost impalpable in a certain sense, but nevertheless, in the eye of the law, a right which is capable of enforcement as soon as the circumstances under which it can be exercised come into existence, and involving and implying a corresponding duty or obligation on the owner of the property subject to the right.

As far as I know the existence of the right of pre-emption as a distinct entity residing in the pre-emptor has always

been recognised in law. The learned judgments of Mr. Justice Mahmud aptly defined it, as a right of substitution for the purchaser in respect of the property sold, and in section 4 of the Punjab Pre-emption Act, it means : " The right of a person " to acquire * * * property in preference to other persons ". It is always spoken of as a burden on the property in respect of which pre-emption can be claimed, and in many judgments of this Court it is referred to, as hampering the free disposition of property by sale and therefore to be strictly construed. An Act of the legislature has been framed in order to regulate its exercise in the Punjab and in village administration papers and *Riwaj-i-Ams* elaborate provisions are entered for the same purpose. In *Dhani Nath v. Budhu* ⁽¹⁾ the judgment in which the nature of the right has been ably analysed and described, it is clearly shown to be a right. Though it is not a *jus in re aliena*, it is a *jus ad rem alienam acquirendum*. It shows that what is affected by the existence of the right of pre-emption is not the right, title or interest of the owner in the property but the exercise of his power of transfer. " The owner of the land so subject is restricted in the claim of the pre-emptor, he is not at full liberty to transfer to whomsoever he pleases * * " at p. 512 the nature of the right is further illustrated and defined. The judgment is a most interesting one and contains the best exposition of the elements of the right that I know of and is of the greatest weight as it was delivered by a most learned judge and acute thinker. It shows that the right is not a right to or in property but one to control the transfer of the property. I am personally disposed to think that it involves a restriction on the full rights of ownership, taking Austin's definition of the term, by hampering the right of disposition in certain respect, but this is a minor matter on which nothing need be said in the present controversy.

It would seem from the foregoing discussion that for purposes of pre-emption, the pre-emptor and the property by virtue of which he claims pre-emption constitute a single unit, and so also the property subject to pre-emption and its owner. The right inheres in the former property and the duty or obligation is incident on the latter, represented in each case by the owner for the time being. It is thus in some respects analogous to, but is not of the same class as the right of case-ment or profit *prendra* which are rights *in re aliena*. The right

(1) 136 P. R., 1894.

and obligation are generally mutual in respect of both properties. Again a right of pre-emption may arise by contract. Such rights are enforced in the equity jurisdiction of the English Courts. See Digest of English Case Law, Vol. 14, cols. 115 and 1154. Could it be said that here also the right is non-existent until the event on which it arises has actually happened.

I am sorry to have entered into this consideration of elementary doctrines, but I find difficulty in justifying my difference with a judge of my brother Rattigan's erudition and acumen on a point of principle like the present without doing so. I cannot understand how, with reference to the considerations I have set forth above, he lays down, as I understand him to do, that the right comes into existence for the first time when the sale is complete, and that in consequence the vendee is in a position of equality with the plaintiff by virtue of the purchase of property (B) which is not subject to plaintiff's right. If it is conceded that the right had an existence in law *before* the sale, the position of the parties is clearly altered and the argument falls to the ground. The plaintiff and the vendor are *not* on a footing of equality, for the sale to the plaintiff of property was an infringement of plaintiff's pre-existing right by the vendor to which the vendee became a party by joining in the sale and the plaintiff's cause of action accrued in respect of the house against both. The vendor's position is not bettered by acquiring the adjoining house, for his right, if any, arose on the completion of the sale, therefore clearly *after* that of the plaintiff. I confess also that I cannot understand how by reason of the sale the defendant-vendor can be said to have acquired a right of pre-emption to the house sought to be pre-empted as purchaser of the adjoining house not sued for and thus to be on a footing of equality with the plaintiff. In the case of two adjoining properties, it does not, I think, admit of dispute that before any right of pre-emption can mutually arise between them it is absolutely essential that they should be in the hands of different owners. If there is such right it is necessarily extinguished, like easements when their ownership is united in the same person. It may revive as some easements do when the ownership is again separated, but it must be non-existent as long as it is common. Now the mutual rights of pre-emption attaching to the two houses sold was extinct as long they were held by the vendor and remained in that state when the sale was completed, for under it the ownership remained common in the hands of the vendee. It could not

revive until the ownership was separated, and it had not been separated before the plaintiff's right was infringed or even before he brought his suit. Further he must have acquired his right to pre-empt the house *at* the time of sale and not *later*. Whose property did he acquire the rights to pre-empt at the sale? Not the vendee's, because he bought the right to both houses by the sale and the vendor had nothing left in them. The title to both houses is in the vendee's hands and he must, therefore, be said to have got a right of pre-emption to his own property which appears to me rather an absurd proposition.

The idea underlying the argument is that the vendee could have pre-empted his house had he purchased the other house first and bought this one later. In that case the ownership of the two houses would have been separated by the first sale and the right of pre-emption would have revived. No doubt had the first sale taken place a moment earlier the vendee would have been in this position unless possibly that sale was liable to be defeated for some reason. By this expedient the plaintiff's right might have been defeated. But we have to apply the law to the facts before us. The expedient, simple as it was, was not thought of nor resorted to, and we have to decide on the basis of a joint sale of the two houses. It seems to me that the simple nature of the expedient cannot be a ground for our not looking the actual facts in the face and deciding on them and for denying the plaintiff his right. It would have been defeated by complying with the law of pre-emption, but it is too late to think of the simple expedient now. The vendee has made a mistake and must suffer the consequences. Many momentous events in the history of the world have been due to little mistakes and would not have happened otherwise. Many a man has been ruined for life from such causes.

In my humble judgment the argument derives no force from the authorities which lay down that the plaintiff pre-emptor can be defeated by a sale by the vendee to another pre-emptor with equal rights before the institution of the plaintiff's suit. The cases are mostly cited in Mr. Shadi Lal's Pre-emption Act, p. 38. It appears to me that those cases merely recognize the assertion of the right of pre-emption out of Court. If the vendee acknowledges a pre-emptor's right and offers to convey the property to the latter by private sale there is no reason why the pre-emptor should be driven to Court if the sale takes place before the other pre-emptor has filed his suit.

In the case of the pre-emptor with a superior claim he keeps the purchase by virtue of his priority of right. In the case of a pre-emptor with an equal right, he reaps the reward of superior diligence in asserting his right. The equitable doctrine of superior diligence in suing, *i. e.*, bringing the earlier suit, has been generally recognised in the case of urban immovable property, see *Mokham Din v. Karim Ullah* ⁽¹⁾, *Chaudhri Khem Singh v. Mussammat Taj Bibi* ⁽²⁾, p. 220 (Mr. Shadi Lal's book, p. 105). It would be sheer pedantry to say that superior diligence can be shown only by a suit in Court. In regard however to several claimants for pre-emption of agricultural land, this Court and the Allahabad Court holds that each claimant was entitled to a proportionate share or to a division *per capita*, see cases cited in pp. 104, 105 of Mr. Shadi Lal's work.

Of the cases relating to private sales to another pre-emptor before the plaintiff sues for pre-emption. *Amir Ullah Shah v. Tube Hussain* ⁽³⁾ is a case of a sale to a superior and not an equal pre-emptor. *Mahtab-ul-din v. Karam Ilahi* ⁽⁴⁾ is a case of a sale to an equal pre-emptor. The case reported as *Janki Prasad v. Ishar Das* ⁽⁵⁾, quoted by Mr. Shadi Lal in this connection at p. 38 of his book, does not deal with such a point but with the loss of plaintiff's right between the arising of his cause of action and his suing for pre-emption. I need not go into the grounds of distinction made in regard to village agricultural land and urban property in the cases cited as they are not germane to the present discussion. Moreover all questions between claimants with equal right are now settled by section 14 of the Act. All that I wish to maintain with respect to the cases which rule that a pre-emptor's suit can be defeated by the vendees selling to a person with equal right to the plaintiff's before the filing of his suit is that they do not support my learned brother's argument about the vendee having equal rights with the pre-emptor because of his having purchased property adjacent to the one in suit by the same deed of sale. The two propositions stand on wholly different footings.

As I said in my previous judgment, I do not admit that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of

⁽¹⁾ 102 P. R., 1881.

⁽³⁾ 138 P. R., 1884.

⁽²⁾ 83 P. R., 1864.

⁽⁴⁾ 73 P. R., 1898.

⁽⁵⁾ I. L. R., XXI, All. 374.

the sale in dispute and the institution of the pre-emption suit. This point is not before the Full Bench, and I would not advert to it, but that my learned brother has advanced that proposition as an argument in support of his view and cited some of the authorities that lay it down. I content myself with again denying the soundness of the proposition and also its bearing in favour of my learned brother's opinion on the question before us. As regards the two authorities cited, I would point out that *Ram Hit Singh v. Narain Rai* ⁽¹⁾ is based on two earlier judgments which simply laid down that a pre-emptor must maintain his position as such at (1) the date of suit and (2) date of decree. In *Bhagwan Das v. Mohan Lal* ⁽²⁾ the principle that a sale to a person with equal rights to those of the plaintiff's pre-emptor before the date of filing the suit defeats the pre-emptor's claim, a point just adverted to and discussed by me, was held to cover the case where the vendee himself became a person entitled to equal rights by virtue of another purchase between the date of the disputed sale and that of the suit for pre-emption. The principles followed in both cases appear to be unobjectionable; but they received, in my opinion, undue and unwarranted extension in the cases themselves. At all events I do not see how they help the position taken up by my learned brother.

My view is in accord with *Uttam Chand v. Lahori Mal* ⁽³⁾.

I would, therefore, reply on the second point in the negative.

28th July 1908.

CHEVIS, J.—I have read the findings recorded by my learned brothers, and regret that I find myself still unable to agree as regards the first point. "Adjoining" is one of the meanings given in the dictionary of the word "adjacent," though not the primary and commonplace meaning, which is "lying near to." But the old custom of a right of pre-emption based on vicinage was, as far as I know, confined to the owner of the "adjoining" property. The codification of the old law effected by the Punjab Pre-emption Act was presumably intended to simplify the law, and if the word "adjacent" used in section 13, seventhly, means "near to" then I submit that the Act has made matters more ambiguous instead of simpler. For who shall say what is "near"? One person might call property three yards off from that sold "near," another might call property 5 yards off "near,"

⁽¹⁾ I. L. R., XXVI, All 389. ⁽²⁾ I. L. R., XXV, All. 421,
⁽³⁾ 112 P. R., 1907.

another might call property 20 or 30 yards off "near," so that the interpretation of the word "adjacent" would, in my humble opinion, be a matter of utter uncertainty, if the word be taken as meaning "near." When one of the meanings of the word, as given in the dictionaries is "adjoining," I would give the word this meaning in section 13; this seems to be the appropriate meaning and the meaning intended in the Act, having regard both to old custom of pre-emption in towns and also to the utter uncertainty of what was and what was not "adjacent" which would arise if the word were held to mean "lying near to." Now I do not contend for a moment that house (C) is near to house (A). I would only point out, by the by, that the south-east corner of house (B) is nearer to house (A) than the north-west corner of house (B) is. But my idea originally was, and still is, that when a person seeks to pre-empt property sold by reason of being the owner of adjoining property he must seek to redeem the whole of such property so far as it adjoins, or in other word is not separated from, his own,—separated, that is, by property not included in the sale-deed. He cannot, of course, claim to pre-empt an insulated block, but he must claim to pre-empt so much as lies in one block, any part of which block adjoins his own property. If the vendee replies "I have bought two separate properties, one only of which adjoins your property," the proper answer seems to me to be, "you have bought the two in one joint sale and we cannot go into the question of whether they are separate rooms or separate houses; there is property sold, and my property adjoins." With all possible deference I beg to adhere to my original opinion on the first question.

As to the second question I entirely agree with my brother Rattigan. I do not think the right of pre-emption comes into existence till a sale takes place. The law may say that if a certain state of affairs takes place I *shall* have a certain right, but that does not, in my humble opinion, give me any present right. There seems to me with all deference to my learned brother Chatterji ample authority for the proposition that a vendee may improve his position subsequent to the sale in question and prior to institution of suit and so defeat a claim to pre-emption. That he can defeat it by placing himself on a level with the pre-emptor prior to the sale in question is admitted on all hands. Then if he can defeat a claim to pre-emption by improving his position either just before or just after the sale in question why cannot he do so at the same moment as the

sale in question, and by the very same sale deed ?

With reference to the paragraph in my brother Chatterji's judgment, " I confess also that I cannot understand
" the title to both houses is in the vendee's hands, and he must,
" therefore, be said to have a right of pre-emption to his own
" property, which appears to me rather an absurd proposition,"
I would say that in my humble opinion this leaves out of consideration the difference between the case of a vendee defending a claim to pre-empt and the case of two rival pre-emptors. In my opinion there is a marked difference between the two cases. If between two rival pre-emptors the claims of both are equal they may in some cases have to share the bargain, and neither can say to the other " your suit fails *in toto* simply because my right " is as good as yours", but this is exactly what a vendee can say to a pre-emptor. The vendee is not a rival pre-emptor, he is not claiming to pre-empt at all. He is simply saying, "you cannot pre-empt because your right is " no better than mine."

I would still answer both questions in the affirmative, *i.e.*, in favour of the vendee.

29th July 1908.

CHATTERJI, J.—On the first point there is a majority of opinion in favour of the pre-emptor and on the second in favour of the vendee. This involves the dismissal of the plaintiff's claim.

But the second point is a new one and makes a large inroad into the position of the pre-emptor as it has been understood up to the present. On the view of the majority no suit for pre-emption will lie when two adjoining urban properties are sold and the right of the pre-emptor extends to only one of them. There is a judgment of a Divisional Bench of two Judges against that view, *Uttam Chand v. Lahori Mal* ⁽¹⁾ and in the Full Bench case there are the opinions of two against one and, yet the former must be treated as overruled. I think in view of the point being new and its important bearing on the right of pre-emption it would be better if the matter was considered and decided by a larger number of Judges. I would accordingly suggest if my learned brothers agree to refer this second question (or both questions if they prefer it) to the Full Court.

RATTIGAN, J.—I agree, but I would suggest that the second question alone should be referred.

29th July 1908.

CHEVIS, J.—I agree, and I do not press that the first question should be referred.

29th July 1908.

CHATTERJI, J.—All the Judges having agreed to refer the second question to the Full Court it is referred accordingly.

29th July 1908.

Upon the reference to the Full Court the following judgments were delivered:—

CLARK, C. J.—I agree with my learned brother Chatterji as to there being what he calls a potential right of pre-emption which exists prior to any sale. It is true that there is no cause of action until the sale has taken place, but this does not show that there has been no previous right.

22nd Dec. 1908.

The right might be described as the right to the right of pre-emption and it exists before, though it cannot be exercised until a sale has taken place. *Ex. gr.*, A has taken a fancy to B's horse and B, though not intending at present to sell the horse, has given A the right of refusal in case of sale. B, however, subsequently sells the horse without reference to A. Surely B by the sale itself has infringed A's pre-existing right of purchasing the horse.

In the same way a man has a right to the peaceful enjoyment of his property, but he has no cause of action until some one has infringed that right by taking away his property.

A sale against the rights of a pre-emptor is an infringement of his right, and the vendee cannot, by an infringement of the pre-emptor's right, create for himself a weapon wherewith to defeat the pre-emptor's right, he cannot by the same deed as violates the pre-emptor's right defeat the pre-emptor's right.

It makes no difference that the pre-emptor has not a right over the whole of the property purchased, if he has a right over part of it, then the sale has infringed that right and cannot be utilized to defeat that right.

This would in itself, I think, be sufficient to answer the second question in the negative. If the cause of action accrues to plaintiff on the occurrence of the sale, then defendant cannot by that very sale defeat the cause of action.

Under section 13 (1) 7 of the Pre-emption Act, the right of pre-emption vests in a person whose immovable property is adjacent to such property.

A person cannot be said to own property adjacent to

the property to be pre-empted when he only acquires that property simultaneously with the property to be pre-empted. I think that a previous ownership is necessarily implied and that a person acquiring property simultaneously is in no better position than a person acquiring property subsequent to the pre-empted. He cannot use a portion of the property acquired as a stepping stone to acquire the rest of the property by pre-emption.

This leads to the question whether a vendee by acquiring property subsequent to the sale to be pre-empted can defeat the right of a pre-emptor.

Conceding that the plaintiff-pre-emptor must retain the prior right up to the time of institution of suit (and even up to decree) it does not, I think, follow that the same rule must apply to the defendant-vendee and that he can defeat the plaintiff if he can show that at the institution of the suit, irrespective of right at the time of sale, the plaintiff has no right of pre-emption over him.

It is a well recognised principle of law that the position of a plaintiff is not the same as the position of defendant. A plaintiff, before the Courts will help him, has to prove an absolute right and he has to do equities which would not be forced on him in the position of a defendant. This is referred to by Mr. Justice Chatterji in *Muhammad Nawaz Khan v. Mussammatt Bobo Sahib* ⁽¹⁾ where he says : " It is also urged that defendant having at all events " immediately parted with his own house ought not to be " allowed to retain the one in suit on the strength of his ownership of that house. But he is defendant, not plaintiff, and " the question of priority must be decided with reference to " the circumstances existing at the time of his purchase and " not at any later period, and if he was entitled to purchase " at the time of sale he did not forfeit his right by parting " with his own house afterwards. It would have been " different had the plaintiff been in his position. *Atma Ram v. Devi Dial* ⁽²⁾ and *Muhammad Ayub Khan v. Rure Khan* ⁽³⁾."

In this case it was held that the defendant-vendee did not impair his rights by parting with the property on which

⁽¹⁾ 44 P. R., 1903.

⁽²⁾ 49 P. R., 1901.

⁽³⁾ 95 P. R., 1901.

his pre-emptive rights were based, it would follow *à fortiori* that he could not improve them by a subsequent acquisition.

A plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action, and if he loses that property either voluntarily or involuntarily before decree, his suit must fail. A defendant, however, cannot defeat such subsisting cause of action by subsequently acquiring property which would have prevented the cause of action of the plaintiff-pre-emptor arising, if it had been acquired, before the sale.

I do not think that a defendant is entitled to improve his position after the cause of action has arisen. If defendant is allowed to do so, then why not plaintiff. Why may not plaintiff subsequent to a sale buy a property to fortify an existing, or even to found a fresh claim to pre-emption of the prior sale on the basis of his subsequent purchase.

In this latter case the cause of action would have arisen after the sale sought to be pre-empted, and this no doubt would bar plaintiff, but is not defendant in the complementary position? Would not he be defeating the right of pre-emption by what corresponds to a cause of action acquired after the sale sought to be pre-empted?

As regards the Allahabad rulings :—

Ram Hit Singh v. Narain Rai ⁽¹⁾ is simply based on the extension of the principle that the pre-emptor's right must be still subsisting at the time of institution of the suit.

Bhagwan Das v. Mohan Lal ⁽²⁾ was based on an extension of the principle that a vendee can by re-selling before suit to one pre-emptor of equal rights, defeat another pre-emptor. With all deference I cannot think that these extensions were warranted, the considerations above referred to were not taken into account and I would over-rule *Darehan Khan v. Sohaura Mal* ⁽³⁾ which followed these rulings.

The question raised has been further discussed by me in my judgment of to-day's date in Civil Appeal No. 98 of 1908.

⁽¹⁾ I. L. R., XXVI All. 389.

⁽²⁾ I. L. R., XXV All. 421.

⁽³⁾ 124 P. R., 1907.

Overruled.

I would answer the question referred in the negative.

23rd Dec. 1908.

REID, J.—The authorities cited and the arguments have been dealt with so exhaustively by the learned Chief Judge, by my brother Chatterji in his judgment in Civil Appeal No. 827 of 1907 and by the referring Judges in Civil Appeal No. 98 of 1908, with all of whom I concur, that I have nothing to add.

For the reasons recorded in those judgments and that order I concur with the learned Chief Judge in answering the question referred in the negative. I am unable to hold that any distinction can be drawn between the position of the purchaser at the date of sale, at the date of suit and at the date of decree. His position at the date of sale governs the decision.

9th January 1909.

RATTIGAN, J.—After hearing full arguments on both sides and with every deference to the opinions of those of my learned brothers who differ from me, I am constrained to adhere to views which I expressed in my former judgment. At the time when I wrote that judgment I had not had the advantage of seeing that of Chatterji J., but I have now read and carefully considered it and also the opinion now expressed of the learned Chief Judge and of my brother Reid. I regret to say that I am in no way convinced by the reasoning of these learned Judges and if on this occasion I feel any hesitation in re-asserting my previous opinion, my hesitation is due, not so much to the cogency of the learned Judges' arguments as to the great respect which I feel for any opinions of theirs upon legal questions of this kind. The point now before us is in reality very simple so far as the facts are concerned. There are three houses A B and C and each house adjoins the other. X, by one deed of sale, buys houses A and B, and Z is the owner of house C., Z claims to be entitled to pre-empt house B, and to this claim X replies that at the very moment when he (X) became owner of house B he was also owner of house A and, therefore, in a position equal to that of Z whose sole ground for claiming pre-emption was that he (Z) was at the date of sale the owner of an adjoining house (C).

Before proceeding I may, as well at once dispose of an argument upon which Chatterji, J., lays some stress in his judgment. He remarks: "I confess also that I cannot understand how by reason of the sale the defendant-vendee can be

“said to have acquired a right of pre-emption to the house
 “sought to be pre-empted as purchaser of the adjoining house
 “not sued for and thus to be on a footing of equality with
 “the plaintiff.” As far as I can remember no such argu-
 ment was ever advanced on behalf of the vendee, but
 the learned Judge thereupon proceeds to demolish it and
 very rightly observes, “In the case of two adjoining
 “properties, it does not, I think, admit of dispute that
 “before any right of pre-emption can mutually arise between
 “them, it is absolutely essential that they should be in the
 “hands of different owners,” and after pointing out that a
 right of pre-emption in respect of different properties cannot
 exist while both properties are in the ownership of one
 and the same individual, he proceeds to ask the question
 “Whose property did he (*i.e.*, the vendee) acquire the right to
 “pre-empt at the sale? Not the vendor’s, because he bought
 “the right to both houses by the sale and the vendor had
 “nothing left in them. The title to both houses is in the
 “vendee’s hands, and he must, therefore, be said to have got a
 “right of pre-emption to his own property which appears to
 “me rather an absurd proposition.”

I entirely agree. For a vendee under such circumstances
 to claim pre-emption would be not only absurd but wholly
 unnecessary. But unfortunately for the purpose of this argu-
 ment he does not claim house B as pre-emptor. What he does
 say and this is of course an entirely different proposition, when
 Z claims house B, is that he (X) is owner of house A, and as
 such in just the same position as Z. He replies to Z’s claim: “You
 “claim pre-emption of house B, because your house C adjoins B.
 “But I am at this moment myself owner of house A and as my
 “house A also adjoins B, how can you say that you have a
 “preferential right to buy house C?” I confess, I feel some
 difficulty in following the reply to the imaginary argument that
 in a case of this kind X is claiming to pre-empt house B. In
 my previous judgment I endeavoured (but I am sorry to find
 with no success) to make this distinction clear. As I then
 remarked when dealing with the possibility [of any such argu-
 ment: “It is said that A by purchasing the latter property,
 “together with the property claimed by the pre-emptor, cannot
 “be said to be entitled to pre-empt the latter, inasmuch as an
 “owner cannot pre-empt his own property. But this argu-
 “ment is beyond the point. A (the vendee) does not claim
 “to be a pre-emptor. What he says in answer to (the

“pre-emptor’s) claim, is this, “At the time when I bought house B I was *eodem ictu* the owner of immovable property adjoining house C which you claim. Your claim to pre-emption in respect of house C accrued only when I had become owner of house A and I was, therefore, in exactly the same position as you were in.” To my mind this is the position taken up in this case by the vendee, and it is unfair to saddle him with an absurd argument which, so far as I know, has never been advanced on his behalf. It seems to me also that the learned Judge in this part of his judgment loses sight of the very material difference between the position of a vendee-defendant who is resisting a claim for pre-emption and a plaintiff-pre-emptor who is attempting to establish that right.

To turn now to the actual facts of the case, X has by one deed of sale bought two properties A and B, and one of the arguments propounded on behalf of the pre-emptor is that it must be assumed that in such a case the purchase of house B is subsequent to the purchase of house A. I say that this assumption is made because I find that Chatterji, J., concedes that, if the sale of house A had occurred one moment before the sale of house B, the vendee would have been able to successfully resist the pre-emptor’s claim. Now, why should it be taken for granted that the sale of house B was subsequent to the sale of house A? Is there any presumption to be drawn in such cases in favour of a pre-emptor? Surely not. It seems to me on the contrary, that the Courts should, if possible, lean to the vendee’s side and should endeavour, compatibly, of course, with the principles of law, to uphold the right of contract. I do not say that any presumption or assumption should be made in these cases, but, if it is open to the Courts to make any such presumption or assumption, they ought, in my opinion, to make it in favour of the vendee rather than of the pre-emptor, and to assume that the purchase of house A was in point of time actually prior to the purchase of house B. But I do not wish to base my opinion upon any such presumption or assumption. My own view is that until a sale of property has actually taken place, and until the identity of the vendee is thereby disclosed, there is no such thing as a right of pre-emption inhering in any person. I entirely accept the definition and analysis of a “legal right” given in Mr. Justice Chatterji’s judgment. But the point upon which I find myself unable to agree with him is this, that in cases of pre-emption I would hold that, until the actual occurrence of a sale, there is no “person of

inherence," and I cannot see how this difficulty can possibly be overcome by adopting the expedient of referring to the person of inherence in vague, and general terms as "the pre-emptor, i.e. the person who would be entitled to claim pre-emption."

Briefly stated, the crucial point at which we are at issue is that while Chatterji, J., apparently holds that a right of a nebulous and indefinite character can exist apart from any determinate person of inherence, I find it impossible to admit the possibility of the existence of a right which is at the moment shadowy and indefinable, and unattached to any particular person or thing. For example, A is the owner of agricultural land. Before he attempts to sell it, can any of the persons specified in clauses (a), (b) and (c) of section 12 of the Punjab Pre-emption Act, predicate of themselves that they have a right of pre-emption and that they can control the acts of A as regards the land? A may never sell at all, and even if he does, he may sell to a person against whom X, Y and Z (who are so-called pre-emptors) have no right of pre-emption. Can, for example, an occupancy tenant assert (before any sale has taken place) that he has a right of pre-emption in respect of the land, although he has to admit that no such right would accrue to him in practice unless (1) a sale does take place, and (2) the sale is made to persons other than those specified in clauses (a) and (b) and in sub-clauses first, second and third of clause (c)? And in this connection I might refer to the observations of the same learned Judge, from whom I have the misfortune now to differ in *Muhammad Ayub Khan v. Rure Khan* ⁽¹⁾ to the effect that the right of pre-emption is merely a burden or restriction on the right of alienation of the property subject to the right, and only comes into being when a transfer takes place and the possessor elects to comply with all the conditions necessary to bring it into actual existence.

I fully admit that "a right can exist without being "exercised, consciously or unconsciously," or in other words in a dormant state. But in any such case the right actually exists, and though in abeyance can at any moment be exercised by the person of inherence, who is a determinate person with defined rights. For instance, A is the owner of a disused barn. He has not attempted to exercise rights of ownership over the barn for years, but (unless he has for other reasons lost his right of ownership) he still remains the owner of it, and he can,

(¹) 95 F. R., 1901.

whenever he so thinks fit and whenever the occasion arises, exercise his rights in respect of it. So, too, A may have a right of easement over another's property and his right is not lost merely because for a few months he makes no use of it. But the case seems to me to be entirely different when we have to deal with a so-called right of pre-emption. Until a sale occurs, how can this right be exercised and how can it, with regard to ordinary parlance, be said to exist? If it does exist, in whom does it vest, and who can exercise it? If the right exists, and if it is vested in some body or other, that person should surely be ascertained, or, at all events, be ascertainable and be able to exercise it when he thinks proper. But obviously until a sale takes place there can be no pre-emptor (to use Mr. Justice Chatterji's language) nor can any one exercise the right of pre-emption. I entirely agree with the learned Judge that as soon as a sale actually takes place, a right of pre-emption may *instantly* accrue. Such right may then accrue, but not necessarily so, for the sale may be to a person against whom no one else has a superior right of purchase. But, because in such a contingency a right of pre-emption may arise and may become vested in a determinate person or determinate persons, I fail to see the logic of the deduction that the latter must be held to have been in possession of *something* before the sale which enables him or them to control the action of the seller. In my humble opinion there is here a *non sequitur*, and this *something* which is admittedly at the best a right of a limited character dependant on certain contingencies and almost impalpable in a certain sense, cannot until a sale occurs be regarded as a legal right capable of enforcement, or indeed as any such right which the law can recognise. Mr. Justice Chatterji accepts the well known definition of the right of pre-emption given by Mahmud J., *viz.*, that it is "a right of substitution for the purchaser in respect of the property sold." If I may with all respect say so, there can be no doubt that this is an accurate definition of the right, and describes it most aptly. But surely a right of *substitution* pre-supposes the existence of a vendee and a previous sale, for otherwise how can the "pre-emptor" substitute himself for a person who does not exist? Here, again, I venture to think that the argument is incontrovertible that unless and until a sale has actually taken place, no right of pre-emption (as distinct from the *possibility of the existence of such a right*) exists in law. Personally I am averse to recognising any doctrine of *scintilla juris* in modern law. A right either exists or does not exist, and if it exists, there must, in my opinion, be some

determinate person in whom it inheres.

Mr. Justice Chatterji is of opinion that the authorities which lay down the proposition that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of the sale in dispute and the institution of the pre-emption suit, have no bearing upon the present case. The learned Judge does not himself admit the correctness of these propositions laid down in *Bhagwan Das v. Mohan Lal* ⁽¹⁾ and *Ram Hit Singh v. Narain Rai* ⁽²⁾, but I confess I am unable to follow his argument that those authorities are not relevant to the present case. Surely if the vendee can better his position by acquiring other properties after the date of the sale in dispute, he can *a fortiori* better his position by acquiring such other properties simultaneously with his purchase of the property in dispute? Is it consonant with reason or logic to hold that X can successfully resist a claim to pre-emption in respect of house B by acquiring house A some six months after the purchase of house B, but that he cannot resist that claim if he happens to purchase houses A and B at one and at the same time? I cannot think so, and I regard the two cases above referred to as direct and relevant authorities in support of the opinion, which I have ventured to express in this case. I am glad to find that the C. J. is at one with me in this point (see his judgment in Civil Appeal No. 98 of 1908).

There are a number of authorities to the effect that a pre-emptor must show that he has a cause of action, or in other words, a preferential right of purchase, but only at the date of the sale of the property in dispute, not also at the time of the institution of his suit. But if this principle is to be accepted, it necessarily follows that the plaintiff's suit in this case must fail, as at the time when it was instituted the vendee was in a position of equality with him inasmuch as both were owners of adjoining houses. For my own part, I fail to see the justice of restricting the application of this rule merely to those cases where the pre-emptor's position has deteriorated between those two dates. The object of the law of pre-emption is to keep out strangers and surely in such cases the Courts should adjudicate not only with reference to the position of the pre-emptor but also of the vendee, and if prior to suit, the latter has been able to improve his position and appears in Court clothed with rights equal or superior to those of the plaintiff, the claim should not be decreed simply because at the date

(1) I. L. R. XXV, All. 421.

(2) I. L. R. XXVI, All. 389

of the sale the pre-emptor was in a better position than the vendee. In the present case I maintain that at the date of sale the vendee was *ipso facto* in as good a position as the plaintiff, but, even if this be denied, he was certainly in as good a position as the plaintiff at the date of the present suit.

I confess I am not pressed by the argument at *inconvenienti* which seems to me, moreover, to tell quite as much on one side as the other. To take a concrete example. A sells land to B. B has a father living at the date of sale, and B's father is a co-sharer with A in respect of the holding of which A has sold his share to B. Obviously B is not "a pre-emptor" as he has no land of his own and *ex hypothesi* he is not an heir of A. An occupancy tenant, X, claims to pre-empt the land sold to B, but before he brings his suit, B's father dies with the result that at the date of suit, B is a co-sharer in the holding with A. Is the Court under these circumstances bound to decree X's claim for pre-emption? I feel great difficulty in so holding, and yet if Mr. Justice Chatterji's view is correct, the Court would have no alternative but to grant the decree.

I have considered this question with the care which it deserves, but with every deference to the opinions of those who think otherwise, I must hold that the plaintiff before us has failed to prove his preferential claim and that his suit should be dismissed, and this on the broad general ground that until the sale was completed in the defendant-vendee's favour, there was no *right of pre-emption* in being in the plaintiff and that when the sale in question actually took place, the vendee was at that very moment in as good a position as the plaintiff. In other words, that the vendee was as fully able to resist the present claim as he would admittedly have been if the sale of house A had been made to him a few minutes before the sale of house B.

The question seems to me very elementary, once the nature of "a legal right" is understood, and it is because I am in entire accord with the learned authors whose definitions of that right have been accepted by Mr. Justice Chatterji, that I find it impossible to agree with the view that there can in law exist a vague right, indeterminate in nature and appertaining to no definite person or thing, and unless this view can be accepted, it is impossible to deny the plaintiff's contention in the present case. Prof. Holland in his well-known work on "Jurisprudence" defines a legal

In the first of these cases Cotton, L. J., explained the real nature of a wagering transaction, and in accordance with that explanation it is clear that in the present case, though defendants employed plaintiffs to enter into wagering transactions for defendants' gain or loss as the event might be, the contract *between defendant and plaintiffs* was not itself a wagering one. Plaintiffs stood to lose nothing and to gain nothing beyond their commission: defendants on the one hand, and the third parties, with whom plaintiffs were to enter into gambling transactions, on the other, alone stood to win or lose upon an uncertain future event. This being so, and wagering transactions being not *forbidden by law* but only being a kind of transactions which the Courts are by law precluded from enforcing, it follows that when a party in the position of plaintiffs in the present case, in pursuance of his agreement with his employer pays a sum of money to a winner, the employer must recoup him. Cf. *Shibho Mal v. Lachman Das* (1). So far as I am aware, this way of looking at the matter has never been seriously dissented from; and I have only stated the argument as it has a bearing on the subsequent questions. Another way of putting the point is that adopted by Bowen, L. J., in *Read v. Anderson*, namely, that in such contracts as that between present plaintiffs and defendants, there is an implied covenant by defendants to indemnify plaintiffs, who have been placed in a position of difficulty and responsibility in consequence of their performing their engagement with defendants, and who have only done what defendants must have contemplated they would do, though there might be no legal obligation.

The second question is the same as the first, except that here we have an "enforceable liability" incurred by the agent instead of an actual cash payment by him. By enforceable liability is meant a liability which the agent cannot resist or repudiate at law; and I think that the reasoning on the point in *Ragnath Sahai v. Mamraj* (2) and in Civil Revision No. 1987 of 1905 (*Jaigopal v. Lachmi Narain*) makes it clear that this question also must be answered in the affirmative. I am of opinion that for the present purpose an enforceable liability is equivalent to a cash payment.

It will be convenient to consider next questions (*iv*) to (*vi*). In (*iv*) the third party owes the agent (say) Rs. 1,000 and the agent on behalf of his principal has incurred a loss to the third party of Rs. 400. Here if the

(1) I. L. R., XXIII All., 165.

(2) 80 P. R., 1895.

agent and the third party adjust their account mutually by setting off the Rs. 400 against a corresponding portion of the Rs. 1,000, it is not easy to see in what respect this differs from a cash payment. The Rs. 400 on neither side remains an outstanding. The result is precisely the same as if the agent went to the third party with a bag of Rs. 400 and paid his losses with it and immediately afterwards the third party handed back the bag saying it was a part payment of the Rs. 1,000 outstanding. I would answer this question in the affirmative.

The answers to questions (v) and (vi) follow upon those to questions (i) and (iv). Both must be answered in the affirmative.

Question (iii) is on a different footing from all the other questions. In form it applies only to the case of a simple loss by the agent to a third party with whom the agent has had no previous dealings; but the answer will cover all cases of outstanding debits against the agent. The entering up of such a debt is not a cash payment, and if the transaction between the pair was of a wagering nature, there is no enforceable liability incurred. It is clear enough law, Cf. *Trikam Damodar v. Lala Amirchand* ⁽¹⁾, and *Kongjee Lone v. Lowjee Nanjee* ⁽²⁾, for instance, that a man who loses a bet and gives an I. O. U. or a promissory note for the amount, cannot be successfully sued upon the document any more than upon the actual bet; and it is not easy to see how the loser makes himself any more liable in law by instructing the winner to enter up in the latter's books an outstanding debit against the former. It seems to me that the making of such a debit by consent of the loser would not estop the loser, upon a suit for the amount by the winner, from pleading Section 31, Indian Contract Act; and thus there is neither a cash payment nor an enforceable liability, and therefore the agent has as yet acquired no cause of action against the principal. I would, therefore, answer this question in the negative.

It will be seen that I do not altogether agree with the application in Ragnath Sahai's case of the rule laid down there. If I understand the ruling aright, the Court disallowed to the agent not only debits constituting an outstanding balance but also debits which had been adjusted against credits. And I would overrule the finding in *Kashmiri Lal v. Girdhari Lal* ⁽³⁾. In that case the learned Judges professed to follow Ragnath Sahai's case, and held that the agent could not recover from his

⁽¹⁾ 8 Bom. H. C. R., 131.

⁽²⁾ 1, L. R., XXIX Cal., 461.

⁽³⁾ 74 P. R., 1908.

determinate person A and that person can in certain circumstances, enforce the right against another person who having bought the property with knowledge of the former's rights is regarded in equity as a mere trustee of the promisee. The reason for this rule is obvious for such a vendee cannot stand in a better position than his vendor. He knows of the existence of the contract and he is bound by it. But to my mind the crucial difference between such a case and that with which we are dealing, is that in the former case even prior to the sale, a certain definite right has by express agreement been conferred upon a determinate person, whereas in the latter case, until a sale actually takes place, the so-called right of pre-emption does not inhere in any determinate person. The distinction becomes more apparent when we realise that even in a case where B has agreed to sell property to A, but in breach of such agreement sells it to X, the sale to X is not invalid, if X is a *bona fide* purchaser without notice of the contract between B and A. In such an event the utmost that A can claim is that B shall compensate him for such damages as in the opinion of the Court he may be entitled to by reason of B's breach of contract, the sale to X remaining perfectly valid and binding on all parties.

Personally I do not think that an illustration founded upon an express contract between two determinate persons serves in any way to elucidate the question now before us, and my brother Chatterjee has not in his judgment attempted to strengthen his argument by any such illustration. He takes his stand upon the ground that even prior to a sale a person who would under certain circumstances be entitled by statutory enactment to claim a right of pre-emption if a sale took place to one who (for lack of better description) I may call, a non-pre-emptor has even prior to a sale "a right of limited character," "a right almost impalpable" in a certain sense, but nevertheless a right of a kind which "is capable of enforcement as soon as the circumstances" "under which it can be enforced come into existence." He frankly admits that in such a case as that now before us, if the vendee had purchased house A one minute before he purchased house B, the plaintiff, as the owner of house C, would have no right to claim pre-emption in respect of the purchase of house B. But he thinks that when the vendee purchases both houses A and B by one and the same deed of sale, the vendee's position is not the same as that of the

pre-emptor because the vendee's right of purchasing house B arose only on the completion of the sale and therefore "clearly" after that of the pre-emptor. I confess with all due diffidence that I cannot follow this argument. The pre-emptor's right of pre-emption in respect of house B arose only when the sale of houses A and B was completed in favour of the vendee (section 18 of the Punjab Pre-emption Act). But at that very moment (as I have already said) the sale of house A was complete so far as the vendee was concerned, and consequently at the very moment that the pre-emptor's right of pre-emption arose, the right of the vendee to resist such a claim had also arisen.

If it is thought necessary for politic or other reasons to circumvent the vendee's rights, the only possible way to do so would be to insist that the so-called pre-emptor had, prior to the date of sale, a right inhering in him which was infringed by that sale. But in my opinion and for reasons already given, the latter has no such right, and in addition to other objections it is, I think, begging the question to hold that in a case of this kind, the purchase of house B was in point of time subsequent to the purchase of house A. I regret that I am not sufficiently erudite to follow this argument, and personally I am in all matters of doubt in favour of upholding the sanctity of contracts. I would not make any presumption in favour of a pre-emptor. The law of pre-emption is a very special branch of jurisprudence and it infringes at times very hardly upon the right of an owner of property to sell that property to his best possible advantage. Undoubtedly in cases where the pre-emptor establishes the right to pre-empt property, his claim must be upheld no matter whether the owner thereby suffers very considerable pecuniary loss. But I must decline to go out of my way to uphold pre-emptive claims which at the best are of doubtful validity, and in the present case, even if my own views as to the law are not accepted, there can, I think, be little question that the pre-emptor's claim is not so clearly proved that a decree should be passed in his favour. The two rulings of the Allahabad High Court above referred to are strong authorities in support of the position which I take up and I know of no authority to a contrary effect. My brother Chatterjee's opinion that those authorities are not relevant is, I am glad to find, not supported by the learned Chief Judge, though in other respects, the latter is not (I regret to find) in agreement with me.

I have dealt at some considerable length with the various points raised in Chatterjee J.'s judgment and also with certain particulars of the learned C. J.'s judgment. To all intents and purposes the Chief Judge adopts the reasoning of Mr. Justice Chatterjee, and it is, therefore, unnecessary for me to refer to the former's judgment *qua* those matters. But I cannot without disrespect omit reference even at the cost of some repetition, to certain passages in the Chief Judge's judgment.

The learned Chief Judge states that "a sale against the rights of a pre-emptor is an infringement of his right, and the vendee cannot, by an infringement of the pre-emptor's right, create for himself a weapon wherewith to defeat the pre-emptor's right. He cannot by the same deed as violates the pre-emptor's right, defeat the pre-emptor's right." With all deference, this is no argument, but mere assertion. We have, first of all, to see if a so-called pre-emptor has a right before we can talk about the infringement of that right. As I have already endeavoured to show, until a sale is actually completed, no person can assert that he has a right of pre-emption. In my humble opinion, a right of pre-emption can only arise if, *when the sale is completed*, the vendee happens to stand in a position of inferiority as regards another favoured person. If, on the other hand, at the moment when the sale is completed, the so-called pre-emptor is found to be in no better position than the vendee, there can be no right of pre-emption, and no infringement of "a right" which did not, prior to the sale, exist as a legal right. If it be urged that this, too, is mere assertion and not argument, I would ask in whom does any right of pre-emption inhere before the completion of a sale? Who is till then the person of inherence, and what is his right? The vendee *ex hypothesi* is then unknown, and how then can A, B, and C or Z say that as against this unknown person they have a preferential right of purchase? The learned Chief Judge then proceeds to deal with the question whether it is possible for a vendee who at the time of sale occupied a position of inferiority, to improve this position *qua* a pre-emptor prior to the date of sale. Personally, I think, he can, but as this question does not arise upon this particular reference, I do not consider the point relevant, and I shall deal with it in the other case which was before us for determination, and which is directly concerned with that question.

My brother Reid has not considered the question independently but has, in general terms, expressed his concurrence with the views of the learned Chief Judge, Chatterjee, J.]

and the Judges who referred Civil Appeal No. 98 of 1908. The precise question now before us was not considered by the latter learned Judges, and with their opinion upon the other question which we have to decide, I shall deal in my judgment in the other reference which we have to dispose of.

I would accordingly answer the question referred to us in this case in the affirmative.

15th June 1908.

ROBERTSON, J.—After carefully considering the views expressed by the learned Chief Judge and my brother Reid and the judgment of my brother Rattigan, I am constrained to agree with the view taken by Mr. Justice Rattigan. I need not recapitulate what he has said. Briefly I have come to my conclusion mainly on the ground that I think that it cannot be said that at the moment of the purchase the pre-emptor had any right of pre-emption over the property claimed superior to that of the vendee, and that unless he can show that he had, the burden lying upon him, the suit must fail. A right of pre-emption is not one which is to be held "*sacro sanct*," and if we are to lean one way or the other—other things being equal—we should lean rather against the interference with the general rights of free contract by a vendor than in favour of such interference on a claim set up by a plaintiff. For these reasons I would dismiss the claim for pre-emption.

8th April 1909.

KENSINGTON, J.—I have considerable difficulty in dealing with this case owing to the divergence of the views taken by my learned colleagues, and I do not wish to add to a discussion which has already extended to such great length.

While fully admitting the force of the arguments of Mr. Justice Rattigan, and the learning with which they are supported, I am unable to accept the conclusion at which he arrives. In my humble judgment no amount of ingenuity gets over the one solid fact that at the time of this sale the plaintiff had a right by pre-emption to the house adjoining his own. I do not think that this right should be defeated by the accidental or incidental circumstance that the sale covered more than one house. And it does not seem to me to be good law to examine the pre-emptor's position from any other standpoint than that which he was entitled to take up at the time of sale.

Hypothetical cases do not help us much, but if we are to consider them at all we cannot overlook the *reductio ad absurdum* suggested at page 521 of the ruling in *Uttam Chand*

v. Lahori Mal ⁽¹⁾ where the question now before us was decided in the pre-emptor's favour. In the later stages of the discussion that ruling has rather dropped out of sight. I think it should be followed, and agreeing with the learned Chief Judges, past and present, I would reply to the questions referred to us in the negative.

SHAH DIN, J.—I regret that upon the question referred to the Full Court, there should be a difference of opinion among the Judges, and that I should find myself opposed to the views of my brother Rattigan, in the statement of which, he has displayed, if I may be permitted to say so, considerable legal acumen and dialectical skill. My learned brother in differing from the opinion expressed by Mr. Justice Chatterji both in the order recorded by the latter as a member of the Division Bench and in his judgment subsequently delivered as a member of the Full Bench of three Judges, has felt the necessity of stating his own reasons at considerable length and has been obliged to critically examine those upon which Mr. Justice Chatterji's views are based. As the question referred is one of great importance, an affirmative answer to which will, in my humble opinion, tend to seriously affect the institution of pre-emption in this Province, and as I cannot, without disrespect to the learned Judge with whom I have the misfortune to disagree, answer that question in the negative without setting out the grounds for doing so, I may, perhaps, be excused for recording what may at first sight appear to be rather a lengthy judgment.

The facts of the case out of which this reference has arisen are very simple, and the actual question referred has been briefly and lucidly stated by my brother Rattigan both in his first judgment delivered as a member of the Full Bench, and in his second judgment recorded upon the present reference. As, however, my learned brother has in the two judgments used different letters of the alphabet to denote the parties to the suit and the houses in dispute, it is necessary, in order to avoid possible confusion in the argument, to state definitely which of the two sets of letters I shall employ in this judgment. The sketch of the houses in suit as given at page 7 of the printed paper-book shows that the pre-emptor's house is denoted by letter A, the house in dispute (which adjoins A) by letter B, and the house sold simultaneously with B to the

(1) 112 P. R., 1907.

vendee but not sued for by the pre-emptor, and which also partly adjoins B, is denoted by letter C. My brother Rattigan in his first judgment has made a slight variation in these letters, for he puts the case out of which this reference has arisen in the following terms :—

“A buys two houses (b) and (c) by one sale deed, and “these two houses adjoin each other. X has for some time prior to “this sale been owner of house (d) which adjoins house (c). “X sues to pre-empt house (c).”

In his second judgment my brother makes a further alteration and puts the case thus :—

“There are three houses A, B and C and each house adjoins “the other. X by one deed of sale buys houses A and B, and Z “is the owner of house C. Z claims to be entitled to pre-empt “house B.”

It will thus be seen that there is in the two judgments of my learned brother a variation as regards the letters which denote the parties and the houses in suit, and to avoid misconception, I propose to follow in this my judgment the illustration adopted by him in the later judgment. The question referred is whether, under the circumstances stated, the vendee X is entitled to say in answer to the claim of the pre-emptor Z that, by reason of his (X) having under the sale-deed become owner of house A, he stands on an equal footing with Z as regards house B, so that Z cannot pre-empt house B which adjoins Z's house C.

If I correctly understand the judgment of my learned brother, the views which he has expressed therein may be summarised somewhat as follows :—

(1). The right of pre-emption comes into existence only after a sale has actually been made, for until a sale of property has actually taken place and until the identity of the vendee is thereby disclosed, there is no such thing as a right of pre-emption inhering in any person. Before a sale takes place the alleged right of pre-emption is at best of a nebulous and indefinite character, existing apart from any determinate person of inherence and unattached to any particular thing. It is impossible to conceive of the existence of such a right as a legal entity. Because on the occurrence of a sale a right of pre-emption may arise and may become vested in a determinate person or determinate persons, it by no means follows that the latter must be held to have been in possession of “some-

thing," "of an impalpable character," before the sale which enables him or them to control the action of the seller. This "something" cannot, until a sale occurs, be regarded as a legal right capable of enforcement, or indeed any such right as the law can recognize. This is further clear from the phraseology of sections 4 and 18 of the Punjab Pre-emption Act.

(2). The right of pre-emption is not a right in property (*jus in re aliena*) but merely a right, in certain defined circumstances which presuppose a sale, to acquire property in preference to definite other persons. But until a sale actually takes place there can be no determinate person in whom the right inheres and who can exercise it.

(3). The so-called right of pre-emption is not a right of forbidding an alienation. It is, as Mahmud, J., aptly describes it, "a right of substitution for the purchaser" in respect of the property sold. After a sale has taken place, all that the pre-emptor can claim is that, if the vendee is not one of the favoured individuals, the Court shall delete his name and substitute that of the claimant in his place. He cannot ask the Court to annul the sale. A right of substitution presupposes the existence of a vendee and a previous sale, for otherwise the pre-emptor cannot substitute himself for a person who does not exist. This also shows that unless and until a sale has actually taken place, no right of pre-emption, as distinct from the possibility of the existence of such a right, exists in law.

(4). If there is a valid contract, enforceable at law, between the pre-emptor and the vendor, under which the latter has bound himself to make the first offer of sale to the former before attempting to sell house B to a third person, then if such third person purchases the house from the vendor with full knowledge of the contract aforesaid, he must be held bound by its terms, and specific performance of the contract may be asked for both against the vendor and the purchaser. An illustration founded upon an express contract between two determinate persons has, however, no bearing upon the present case, for the simple reason that whereas in the case given prior to the sale a certain definite right has by express agreement been conferred upon a determinate person, in the present case until a sale took place the so-called right of pre-emption did not inhere in any determinate person.

(5). The authorities which lay down the proposition that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of the sale in dispute and the institution of the pre-emption suit, are certainly relevant to the present case. For, if the vendee can better his position by acquiring other properties after the date of the sale in dispute, he can *à fortiori* better his position by acquiring such other properties simultaneously with his purchase of the property in dispute.

(6). According to a number of authorities a pre-emptor must show that he has a subsisting cause of action, *i.e.*, a preferential right of purchase, not only at the date of the sale of the property in dispute but also at the time of the institution of his suit. From this it follows that the plaintiff's suit in the present case must fail, inasmuch as whatever may have been the case at the time when the sale took place, at the date of the institution of the suit the vendee was in a position of equality with him, both being owners of adjoining houses.

(7). In the present case by the very sale-deed under which the vendee became owner of house B which adjoins the pre-emptor's house C, he also became owner of house A, which in its turn adjoins B, and therefore at the date of sale the vendee was *ipso facto* in as good a position as the pre-emptor *qua* house B. But if this be denied, he certainly was in as good a position as the pre-emptor at the date of the institution of the suit.

(8). It is not correct to say that in the present case the vendee has, by reason of the purchase of houses A and B, acquired a *right of pre-emption* as regards house B. He does not claim to *pre-empt* B, but simply *resists* the pre-emptor's claim with respect to it, on the ground that at the very time when the latter's claim to pre-emption accrued, he (the vendee) himself became owner of the adjoining house A, and was, therefore, in exactly the same position as the pre-emptor. In this connection one should bear in mind the material difference between the position of a vendee defendant, who is resisting a claim for pre-emption, and a plaintiff pre-emptor who is attempting to establish that right.

(9). One of the arguments advanced on behalf of the pre-emptor is, that it must be assumed that in the present case, the purchase of house A is subsequent to the purchase of house B. That this assumption is made is clear from the admission that, if the sale of house A had occurred one moment before the sale

of house B, the vendee would have successfully resisted the pre-emptor's claim. Such an assumption is unwarranted, and if an assumption has to be made in a case of this kind, where rights created by a contract are interfered with, it should be made in favour of the vendee, that is to say, it should be assumed or presumed that the purchase of house A was in point of time actually prior to the purchase of house B.

(10). The argument *at inconvenienti* tells as much on the side of the vendee as on the side of the pre-emptor, and it should not therefore be given much weight to.

(11). The law of pre-emption is a very special branch of jurisprudence, and as it interferes with freedom of contract and infringes at times very hardly upon the right of an owner to sell his property to the best advantage, in all cases where the pre-emptor's claim is not clearly proved, a decree should not be passed in his favour.

The above is, I trust, a fairly accurate summary of my brother Rattigan's views as expressed in his judgment, and I may at once say that, while I find it impossible to agree with him in respect of his main position as regards the precise nature and operation of the right of pre-emption, in some of his observations as briefly indicated above I unhesitatingly concur. The real controversy, as is clear from my learned brother's judgment, centres round the nature and incidents of the right of pre-emption, and the admitted importance of the point thus raised renders it imperatively necessary to enter into a discussion of it in some detail. My learned brother strenuously maintains, and has brought very considerable learning to bear upon his position, that until a sale has actually taken place, there can be no such thing as a right of pre-emption vesting in any particular person; in other words, that it is only after property has been sold to a particular vendee that a pre-emptor's right of pre-emption for the first time comes into existence; and as a corollary of this he holds that, if at the time of the sale of the property in dispute the vendee becomes by that very sale an owner of other property, the ownership of which places him in a position of equality *qua* the property in suit with the pre-emptor, the latter's claim cannot possibly succeed against such a vendee. I am free to confess that if the first proposition were to hold good, the second proposition would seem to follow as a logical deduction therefrom; but in my humble judgment the first proposition cannot be maintained as a correct legal principle, and the second proposition must therefore fall to the ground. In order

that there may be no misconception as to the exact character of my learned brother's position, it appears to be necessary to extract from his judgment those passages which bear directly upon the question under consideration.

"My own view," says my learned brother, "is that until a sale of property has actually taken place and until the identity of the vendee is thereby disclosed, there is no such thing as a right of pre-emption inhering in any person. I entirely accept the definition and analysis of a 'legal right' as given in Mr. Justice Chatterji's judgment. But the point upon which I find myself unable to agree with him is this, that in cases of pre-emption I would hold that until the actual occurrence of a sale there is no 'person of inherence,' and I cannot see how this difficulty can possibly be overcome by adopting the expedient of referring to the person of inherence in vogue and general terms as the pre-emptor, that is, the person who would be entitled to claim pre-emption. Briefly stated, the crucial point on which we are at issue is that, while Chatterji J, apparently holds that a right of a nebulous and indefinite character can exist apart from any determinate person of inherence, I find it impossible to admit the possibility of the existence of a right which is at the moment shadowy and indefinable and unattached to any particular person or thing."

My brother Rattigan admits that a right can exist without being exercised consciously or unconsciously. But he argues that, in any such case the right actually exists, and though in abeyance can at any moment be exercised by the person of inherence who is a determinate person with defined rights." He supports this view by citing two examples. One example is of a right of ownership in a disused barn which, though not exercised for years, can (unless lost by the owner for some reason or other) still be exercised whenever the owner thinks fit to do so, and whenever the occasion arises for the exercise thereof. The other example is of a right of easement possessed by one owner of property over another's property, which can be exercised by the former whenever he chooses to do so, though he makes no use of it for a few months. After citing these examples my learned brother proceeds—"But the case seems to me to be entirely different when we have to deal with a so-called right of pre-emption. Until a sale occurs, how can this right be exercised and how can it, with regard to ordinary parlance, be said to exist. If it does exist, in whom does it vest, and who can

"exercise it? If the right exists and it is vested in somebody
"or other, that person should surely be ascertained or, at all
"events, be ascertainable and be able to exercise it when he
"thinks proper. But obviously until a sale takes place there can
"be no pre-emptor' (to use Mr. Justice Chatterji's language), nor
"can anyone exercise a right of pre-emption. I entirely agree
"with the learned Judge that as soon as a sale actually takes
"place, a right of pre-emption may *instantly* accrue. Such right
"may then accrue, but not necessarily so, for the sale may be to
"a person against whom no one else has a superior right of
"purchase. But, if in such a contingency, a right of pre-
"emption may arise and may become vested in a determinate
"person, or determinate persons, I fail to see the logic of the
"deduction that the latter must be held to have been in posses-
"sion of something before the sale which enables him or them
"to control the action of the seller. In my humble judgment
"there is here a *non-sequitur*, and this something, which is
"admittedly at the best a right of a limited character dependent
"on certain contingencies and almost impalpable in a certain
"sense, cannot until a sale occurs be regarded as a legal right
"capable of enforcement, or indeed as any such right as the law
"can recognise."

"I find it impossible to agree with the view that there can in
"law exist a vague right, indeterminate in nature, and apper-
"taining to no definite person or thing, and unless this view
"can be accepted it is impossible to deny the defendant's con-
"tention in the present case."

"In every case there must be some determinate person in
"whom the right exists. But when we come to deal with the
"so-called right of pre-emption, we are at once met with the
"difficulty that until a sale actually takes place no person can
"assume to have a right of pre-emption, which is not a right in
"property (*jus in re aliena*) but merely a right in certain
"defined circumstances (which necessarily pre-suppose a sale) to
"acquire property in preference to definite other persons." * * *

"It is in my humble opinion erroneous to describe the
"so-called right (of pre-emption) as a right of forbidding an
"alienation. Its very name shows that this is not its true
"nature, and it is obvious that when a sale takes place, those
"favoured individuals who have the right of substituting them-
"selves, if they so think fit, for the vendee have not the right to
"forbid the sale. They cannot ask the Courts to annul the
"sale. All that they can claim is that, if the sale is in favour

"of a person who is not one of the favoured classes, the Courts shall delete the name of the vendee and substitute their own names in his place. Section 12 of the Punjab Pre-emption Act gives a right of pre-emption to various persons, but until a sale has actually taken place, not one of those persons can assert that he will have a right to have himself substituted for the vendee, for the sale may be to a person against whom no one else has a right of pre-emption. Furthermore, no one can compel the proprietor of the property to sell it, and admittedly unless a sale takes place no right of pre-emption can be claimed." * * * * *

After giving two quotations from Sir William Rattigan's *Jurisprudence* (3rd Edition), pp. 29 and 107, bearing upon the conferment by law of special rights on any individual by reason of the existence of special facts, my learned brother proceeds as follows:—

"Accepting this analysis of a right, I think that, so far as the so-called right of pre-emption is, concerned it is obvious that the right can come into existence, from a legal point of view, only through the intervention of a sale which is in this respect the 'collative, investitive fact,' and that unless and until a sale actually takes place, no such right or title can exist in law. In this connection, I may be excused for again referring to the phraseology of section 18 of the Punjab Pre-emption Act which makes it, in my opinion, abundantly clear that no person can claim to have a right of action as a pre-emptor until the completion of a sale. * * *

"If it is thought necessary for political or other reasons to circumvent the vendee's rights, the only possible way to do so would be to insist that the so-called pre-emptor had prior to the date of the sale a right inhering in him which was infringed by that sale. But, in my opinion, and for reasons already given the latter has no such right."

Dealing with the learned Chief Judge's view that a sale against the right of a pre-emptor is an infringement of his right, and that the vendee cannot by an infringement of the pre-emptor's right create for himself a weapon wherewith to defeat the pre-emptor's right, my learned brother characterises it as no argument but mere assertion, and then goes on to say:—"We have first of all to see if the so-called pre-emptor has a right before we can talk about the infringement of that right. As I have already endeavoured to show, until a sale is actually completed,

“no person can assert that he has a right of pre-emption. In my humble opinion, a right of pre-emption can only arise if when the sale is completed, the vendee happens to stand in a position of inferiority as regards another favoured person. If, on the other hand, at the moment when the sale is completed the so-called pre-emptor is found to be in no better position than the vendee, then there can be no right of pre-emption, and no infringement of a right which did not prior to the sale exist as a legal right. If it be urged that this, too, is mere assertion and not argument, I would ask in whom does any right of pre-emption inhere before the completion of a sale? Who is till then a person of inherence and what is his right? The vendee is *ex-hypothesi* then unknown, and how then can A, B and C or Z say that, as against this unknown person, they have a preferential right of purchase?”

Applying the above principles to the present case, my learned brother says:—

“The pre-emptor's right of pre-emption in respect of house B arose only when the sale of houses A and B was completed in favour of the vendee (section 18 of the Punjab Pre-emption Act). But at that very moment, as I have already said, the sale of house A was complete, so far as the vendee was concerned, and consequently at the very moment that the pre-emptor's right of pre-emption arose, the right of the vendee to resist such a claim had also arisen.”

From the above extracts, it will be observed that my learned brother fully agrees in the definition and analysis of a “legal right” as given by Professor Holland, but that he denies that before a sale has actually taken place it can be affirmed of any determinate person that he has a “right of pre-emption,” in the legal sense of that phrase, so that he can be termed a “person of inherence” in respect of such a right. It becomes necessary, therefore, to ascertain what the precise nature and origin of a right of pre-emption is in this Province; and for this purpose it appears to be desirable to discuss the question with reference to (1) custom, (2) statutory enactments and (3) Muhammadan Law. A reference to Muhammadan Law in this connection would be useful for two reasons: first, because, though customary pre-emption, as recognised in this Province, differs in many respects from pre-emption as recognised by Muhammadan Law, yet the legal foundation of that right is substantially the same in both cases; and secondly, because my brother Rattigan himself accepts the definition of the right of pre-emption as given by that eminent

Judge, Mr. Justice Mahmud, who, as is well known and as I shall presently show, constructed that definition from the elements of the right of pre-emption as known to Muhammadan Law.

Before proceeding further, I may remark that much of the difficulty in the present case which has led to such marked diversity of opinion among the Judges arises from the fact, and I say so with the greatest possible respect, that the distinction between a primary or antecedent right and a secondary or remedial right in its application to the institution of pre-emption has not been kept in view. This distinction is fully recognised in jurisprudence and has always to be borne in mind in all discussions as to the nature and operation of any given legal right. Austin discusses the subject with his usual fullness and perspicacity in his *Jurisprudence* (3rd Edition), Vol. II, Lecture XLV, page 787. In *Holland's Jurisprudence* (4th Edition), pages 124—125, the distinction is clearly set out.—“An antecedent right is one which exists before any wrongful act or omission, it is a right which is given for its own sake; while a remedial right is one which comes into existence after the antecedent right is invaded, it is one given merely in substitution for compensation for an antecedent right, the exercise of which has been impeded or which has turned out not to be available.” As he further on observes:—“If all went smoothly, antecedent or primary rights would alone exist. Remedial or sanctioning rights are merely part of the machinery provided by the State for the redress of injury done to antecedent rights. This whole department of law is, in an especial sense, added because of transgressions.”

Sir William Rattigan in his *Science of Jurisprudence* (3rd Edition), pages 31-32, brings out the same distinction as follows:—

“Rights again may be divided into primary (or antecedent) or secondary (or remedial), according as they exist independently of, or in connection with, a wrong having been committed. A right of the former kind is said to be an exceptional advantage granted to the person who is clothed with it, while a right of the latter kind is one which is given by way of compensation when an antecedent or primary right is violated.” Proceeding further, he draws a distinction between primary and secondary duties which are co-relatives of primary and secondary rights; that is to say, primary duties are those which exist *per se* and independently of any other duty, while secondary duties are

those which have no independent existence, but only exist for the sake of enforcing other duties, see also Markby's *Elements of Law*, (6th Edition), page 102, paragraph 183; and Pollock's *Essays in Jurisprudence*, pages 15-16.

The totality of a right "at rest", as contra-distinguished from a right in "motion", comprises its twofold aspect as a primary and as a secondary right, and requires to be studied, as explained by Holland (page 128) with reference to its "orbit" and its "infringement." By its "orbit" is meant the sum or extent of the advantages which are conferred by its enjoyment, and this is what constitutes a primary right. By its "infringement" is meant an act, omission or forbearance which interferes with the enjoyment of those advantages, and this act, omission or forbearance gives rise to a secondary right. "A knowledge of the orbit of a right necessarily implies a knowledge of its infringement and *vice versa*, since the one is always precisely correlative with the other. To know the whole extent of the advantage conferred by the enjoyment of a right is the same thing as to know what acts are infringements of it". The nature of a primary right may therefore be, and very generally is, ascertained by reference to the acts, omissions and forbearances which constitute its infringement, and which give rise to a secondary right. This latter right, when its realisation can be secured with the aid of a legal tribunal, is commonly known as a right of action or cause of action, its object being either restitution or compensation. "When a right (*i.e.*, a primary right) is "violated", says Holland, "the law endeavours to prevent the person of inherence from losing or the person of incidence from gaining. A new right (*i.e.*, a secondary right) is therefore immediately given to the former, by way of compensation for his loss, and a new corresponding duty is laid upon the latter by way of make-weight against any advantage which he may have derived from his aggression" (pages 265-266).

Sir William Rattigan briefly discusses the same question thus:—"Every right may also be considered from a twofold aspect, (a) as a right existing independently of any wrong having been committed when it may be called an antecedent right, and (b) as furnishing the ground for a remedial action for compensation, when it has been infringed or violated" (page 116). Again:—"By the infringement of a right is meant that the enjoyment of those advantages which a right confers upon the person in whom it resides is interfered with by the act, omission or forbearance of another. Every such

“infringement denotes that an injury or wrong has been committed which is imputable to the person by whose act, omission or forbearance it has resulted (page 98).

The right of pre-emption, like other rights, has to be regarded in a twofold aspect, (1) as a primary or antecedent right, and (2) as a secondary or remedial right. Viewed as an antecedent right, it exists before and independently of any wrongful act or omission, that is to say, it entitles the person of inherence in preference to a third person or a class of persons, to an *offer of sale* of the property, which is the object of the right, by the person of incidence, upon whom a corresponding primary duty to make such offer is laid. Viewed as a remedial right, it comes into existence after the primary right has been infringed by a sale of the property in question being made by the person of incidence to such third person or class of persons, and its purpose is the removal of the injury complained of by the substitution of the person of inherence for the vendee or vendees who aided in the infringement of the primary right.

An unauthorised sale, therefore, being a violation of the primary right of pre-emption can only give rise to the secondary right of pre-emption, and because this secondary right does not, as it cannot, come into existence before a sale to a person with an inferior right to the person of inherence has taken place, it is, in my humble judgment, incorrect to say that the primary right of pre-emption does not exist before the sale in question. If, under no circumstances, a primary right of pre-emption can exist before a sale takes place, and if a sale is not an infringement of any such right, how can such sale give rise to a cause of action? And if a sale does give rise to a cause of action, as it cannot be denied that it does, it can only do so because a secondary right of redress for a wrong has occurred by reason of a primary right having been infringed by that sale. I find it impossible to conceive of a cause of action accruing without there being an infringement of a right; and there can be no infringement of a right unless that right exists before the infringement takes place. The infraction of a right necessarily pre-supposes that the right exists before and independently of such infraction; and it is difficult to realise how the very infraction of the right, which it is the object of the law to prevent, can confer upon a person the right which is said to be violated. As I understand a primary right of pre-emption, it entitles the person in whom it resides to an offer of sale by the person against whom it is available before a sale actually takes place. If the offer is made

to him on certain terms and he accepts it and the sale takes place in his favour, or if he declines the offer and the sale is then made to another person on the same terms, the pre-emptor's right is respected and in no way infringed; and his secondary right which arises only upon an infringement of the primary right does not accrue. If, on the other hand, no such offer is made to him and the sale takes place in favour of a person with a relatively inferior right, then the primary right of the pre-emptor has been infringed, and his secondary right to have the wrong redressed in the shape of substitution of himself for the vendee, or, in other words, his cause of action has arisen. It is to this secondary right that the repealed section 9 of the Punjab Laws Act and sections 4 and 18 of the Punjab Pre-emption Act, *primâ facie* refer, and not to the primary right of pre-emption which exists before and independently of a sale. These sections primarily treat of the right of pre-emption not in respect of its "orbit" but in connection with its "infringement", as it was only necessary for the Legislature to indicate in these sections the exact form of transfer of property that was considered an infraction of the antecedent right sufficiently serious to be redressed by resort to an action at law. To ascertain the exact nature of the primary right of pre-emption we must have recourse to custom, as embodied in village and tribal records known as the *wajib-ul-arz* and the *rivaj-i-am*, to the repealed sections 13, 14 and 15 of the Punjab Laws Act and sections 16 and 17 of the Punjab Pre-emption Act, and to the analogous provisions of the Muhammadan Law. These I shall now proceed to consider in some detail.

The right of pre-emption being connected with the Law of Property it is impossible to understand its true nature and origin without reference to the early history of property in land in this province; in other words, without reference to the history of the genesis and growth of village communities, which are a prominent feature of land tenure in this part of the country. As Sir Henry Maine has observed in his *Early History of Institution*, "the collective ownership of the soil by groups of men either in fact united by blood relationship or assuming that they are so united, is now entitled to take rank as an ascertained primitive phenomenon"; and it has been truly remarked that the Punjab affords a conspicuous instance of the general truth of this observation. There can be little doubt that, so far at least as this province is concerned, joint ownership of land by an aggregate of individuals known

as a "tribe" is the really archaic institution which preceded by long steps the institution of separate ownership as known in modern times. The personal relations *inter se* of the members of each tribe were inextricably mixed up with proprietary rights in the land held in joint ownership, and such was the strength of tribal feeling against any outside influences being allowed to break the cohesion, born no doubt of the idea of common descent, of this land-holding group that for a long time the very idea of any smaller group of individuals or of any one member of it dealing on their or his own account with any portion of the soil was strenuously excluded. In course of time the inevitable process of tribal disintegration gave rise to "village communities" within the tribe, which shared in a slightly less intense form all or most of the characteristics of the tribe, and these in their turn gradually split up into "joint families." The transition from joint ownership of the land to individual property therein, as evidenced by successive stages in the development of village communities, is very clearly indicated by the three dominant forms of land tenure which exist side by side up to the present moment in the Punjab *viz.*, *Zamindari*, *Pattidari* and *Bhaiachara* tenures. In the *Zamindari* tenure, undivided proprietary right is its distinguishing characteristic. The land is held as a joint estate, in the whole of which all the sharers have a common right without any separate title to distinct lands forming part of the estate. In the *Pattidari* tenure disintegration has begun; but the communal origin of property still regulates its distribution and the chief public duty connected with it. The lands are divided and held separately but they are divided on shares based either on personal descent or on the proportions of the once common stock which particular families have either held from the outset or appropriated by prescription. The land and revenue are, therefore, said to be divided upon ancestral or customary shares, subject to succession by the law of inheritance. In a pure *Bhaiachara* estate shares have become quite extinct, a certain defined extent of land is in the possession of each proprietor, and neither in fact nor in theory is the holding part of a common stock.

The institution of the right of pre-emption as known to us in the Punjab is intimately associated with the constitution of the "village community" in its graduated forms as explained above, and the rules originally adopted by custom in regard to that right which have subsequently been embodied in Legislative enactments exhibit in an interesting manner the main

lines of the connection between that right in its application to property in land and, the actual, probable or assumed relationship by blood among the members of the proprietary body that constitute a village community. I allude here to the prescribed order in which, according to the entry in a typical *Wajib-ul-arz* or *Rivaj-i-am*, the right of pre-emption vests in the members of a village proprietary body, which order was, in a slightly modified form, adopted in the repealed provisions of the Punjab Laws Act relating to pre-emption, and which has been reproduced, again in an altered form, in section 12 of the Punjab Pre-emption Act. It seems to me, therefore, that in its nature and origin the right of pre-emption is nothing more nor less than a right conferred upon and exerciseable by each member of the proprietary group primarily with the object of preserving the integrity of the village community by preventing any interference with the course of devolution of land in strict conformity with customary rules of inheritance. That that is not the whole object and effect of the custom of pre-emption at the present day, I freely admit, but in my humble opinion the existing aspect of this institution, which pre-supposes a power of transfer on the part of the owner of the land, is one which has gradually developed under the inevitable influence of the successful assertion of individual right in property, and is by no means sufficient to destroy or materially modify its original character.

Our knowledge of the origin and development of customary rules that govern the enjoyment of landed property in the Punjab, fully justifies the conclusion that the Austinian conception of "ownership" was absolutely unknown in the early stages of evolution of village communities, and that with the progress of time it assumed clearer shape in proportion as the family asserted its freedom from the communal control and the individual in his turn asserted his independence of the restraints imposed by the joint family. The development of a power of free disposition possessed, according to Austin, by an owner of property has, so far as landed property in the Punjab is concerned, been marked by three successive stages: First there is no power of disposition at all, owing to the fact that in primitive society the land belongs to a whole tribe or to a whole village community, and as their wants are few and simple and are amply met by a periodical distribution, among families or groups of families constituting the community or the tribe, of the profits of the soil, no occasion for a voluntary

transfer of any portion thereof arises. *Secondly*, the power of disposition is recognised, but it is so only for certain specified objects (grouped latterly by our Courts under the comprehensive term "necessity"), the reason being that, owing to a progressive social disintegration and a concomitant expansion of family and individual needs, the cohesion of the community and ultimately of the family loses much of its original strength, and as a consequence the original control over an individual's power to deal with the land in his possession is weakened. *Thirdly*, a time comes when a free power of disposition without necessity is recognised, but it is subject to this important qualification that before the disposition is made the owner is bound to make an offer of the land sought to be alienated to a certain class of persons in a defined order, suggested by the varying degrees of blood relationship between the owner and those persons or by his more or less close association with them in regard to the subject-matter of the disposition. The owner is thus under an obligation of a definite character to those persons to whom the aforesaid offer has to be made, and whose consent therefore has to be obtained as a necessary preliminary to the validity of a disposition in favour of a third person; and a corresponding right to exact an offer is created in favour of or vests in each of the said class of persons as against the said owner. This last mentioned right is the primary right of pre-emption; and though in point of development it is the last of a series of residuary rights possessed by each member of a village community against all the rest, it differs from them only in degree and not in essential character, and has its roots along with them in one common sub-soil of social notions having for their object the preservation of tribal or communal unity by scrupulously maintaining in all their strength the original bonds between proprietary rights and kinship in blood. In its inception, therefore, the right of pre-emption is, in my opinion, the right of preventing or controlling the disposition of property, though, belonging as it does to a comparatively late stage of the evolution of property in land, it has necessarily assumed a weak form of protest against such disposition, and though by reason of the many devices invented and allowed to defeat it, and owing to many other causes, it has frequently failed of its real object. To say, therefore, that this right in its essence is *not* "a right of forbidding an alienation," because "as its very name shows when a sale takes place those favoured individuals who have the right of substituting themselves, if

"they so think fit, for the vendees have not the right to forbid the sale," is, with all possible respect, to ignore the origin of the right and to place it in a false perspective with regard to the history of the development of legal notions in village communities in this province. The *primary* object of the right is to "forbid an alienation," in cases where it cannot be otherwise forbidden, by seriously hampering the owner's power of disposition by laying down onerous conditions under which alone it can be exercised; and the right of substitution for the alienee is only appealed to and availed of as a last resort when an alienation has actually been made in defiance of the community's inherent right of objection to it, and when the mischief done cannot be remedied in any other way.

In the Full Bench decision of this Court reported as *Gujar v. Sham Das* ⁽¹⁾ which will always stand as a landmark in the history of the case-law on the subject of the power of a sonless owner among agriculturists to alienate his ancestral property, Sir Meredyth Plowden and Mr. Justice Roe, two of the most eminent Judges, who ever sat on the Bench of this Court, take the same view as I have ventured to express just now in regard to the nature of the right of pre-emption. At page 243 of the report, Roe, J., says:—

"Amongst the villages, some to this day preserve their original form of a joint proprietary body: in others, and these are the majority, the common land or a large portion of it has been permanently divided amongst families, and in some cases amongst individuals. But even where the subdivision has proceeded furthest, *the power of dealing with the land is not absolutely free. It is always restricted by rules of pre-emption*, which enable all members of the community to exclude strangers, and it is universally admitted that a proprietor who has male lineal heirs cannot, except for necessity, alienate without their consent." Similarly at pages 247-248 Sir Meredyth Plowden says:—

"I think we are justified in stating as a general principle consonant with fact, that the mere circumstance that immovable property is ancestral raises a presumption that *the individual in possession as owner has not an unrestricted power of disposition*, but only a power liable to be controlled by

(¹) 107 P. R., 1887, F. B.

“those descendants of the common ancestor whom custom regards
 “as being by community of descent sufficiently interested
 “to be entitled to interpose. The least potent form
 “of control is that permitted by the custom of pre-
 “emption which gives the right of preference when a disposi-
 “tion is intended. This right, especially among agriculturists,
 “is most frequently based upon relationship. It has no doubt
 “other sources, and extends to property other than ancestral.
 “The controlling power may, however, be left out of further
 “consideration as being sufficiently ascertained and regulated
 “by law.”

In Roe and Rattigan's Tribal Law, which being the
 int production of Sir Charles Roe and my brother Rattigan
 is entitled to rank as a work of authority, the nature of the
 right of pre-emption is thus explained:—“*Pre-emption is*
 “*merely a corollary of the general principles regulating the succession*
 “*to and power of disposal of land.* In these matters the holder
 “of the estate for the time being is subject, generally speaking,
 “to the control of the group of agnates who would naturally
 “succeed him, his *warisan yak jaddi*. They can, as a general
 “rule, altogether prevent alienations by adoption or gift, or by
 “sale for the holder's own benefit, it would be only a natural
 “rule that, when a proprietor was compelled by necessity to
 “sell, these agnates should be offered the opportunity of advancing
 “the money required and thus saving what is really their own
 “property” (page 83). Again at page 26, it is said:—“*Pre-*
 “*emption is the last means by which the natural heirs can retain*
 “*ancestral property in the family, when they are unable to*
 “altogether prevent an act of alienation by the holder of
 “the estate.”

In a later Full Bench decision *Dilsukh Ram. v. Nathu Singh* (1)
 Sir Meredyth Plowden explains the nature of the right of
 pre-emption in a judgment which for power of analysis and
 lucidity of exposition has scarcely yet been surpassed. That was
 a case in which in support of a claim for pre-emption (or more,
 properly speaking, pre-mortgage) in respect of a mortgage of
 land by way of conditional sale, the plaintiff relied upon entries
 in the *Wajib-ul-arz* of the village made in 1842 and 1880.
 These entries were to the effect that there had been no mort-
 gage or sale in the village up to 1842 and 1880, respectively, but
 that every co-sharer was thenceforward to be at liberty to

mortgage or sell his share for necessity or to pay arrears of Government revenue, provided that he first offered the said share to certain specified persons.

Upon a question being raised whether these entries established a custom of pre-emption in favour of the plaintiff or evidenced an agreement sufficient to support his claim, Sir Meredyth Plowden in delivering the judgment of the Full Bench said at pages 354-355 :—" Let us see what the plaintiff's claim imports by looking to the nature and origin of a customary right of pre-emption on sales in a village community where the custom of pre-emption prevails. No member of the proprietary group is competent to sell his share, or land representing that share, to a stranger to the village of his own sole will and irrespective of the assent of the remainder of the co-sharers. That is to say, *every one of the co-sharers is under an obligation to all the rest to abstain from selling to a stranger irrespective of their assent.* The obligation is due by each to all the rest, and the right, viewed generally, is in all the rest against each. What the order of precedence among the members of the group may be is a distinct question not affecting the nature of the right, but only its exercise by individuals as occasion arises."

" The primary obligation not to sell independently of the co-sharer's assent is not to be confounded with the obligations subsidiary to, or consequential upon, the primary right when a sale is contemplated, or when a sale has been made, irrespective of the assent of other co-sharers. The vendor in making an offer to the co-sharers only takes a step towards discharging his obligation not to sell irrespective of the assent of his co-sharers, and the right to relief whether it be to amendment of the sale or to substitution for the vendee, is clearly a secondary right, arising upon breach of the primary obligation."

" What then is the source of the obligation to which the right corresponds? The cause of it is that the subject of sale is part of a thing which is viewed as conjointly held by a group, of which the vendor is a member. It is, in the absence of agreement to the contrary, a necessary consequence of this view that a member of the group should be incompetent to sell part of the thing conjointly owned by the group irrespective of their assent. The view which is commonly taken of the relation between a group of proprietors in a village community and the land of the village community in its entirety, is that *the land is deemed still to belong to the group, notwithstanding*

" it has been, in part, distributed into parcels for separate enjoyment by portions of the group. The unity of the village, and of the proprietary body as an individual local group, is deemed to continue unaffected by the distribution of the land for purposes of enjoyment among the members of the group."

" The incapacity of the holder of what is viewed as part of a larger and entire thing to make an effectual disposition of the part he holds, irrespective of the assent of other persons jointly interested in that whole, is now quite familiar to us. We see it in the incapacity of a sonless man to dispose, except for necessity, of the portion held by him of land which has devolved from a common ancestor, irrespective of the assent of his near *varisan yak jaddi*. Here the incapacity arises out of the relation existing between them and him as composing a single family group *qua* all the land descended from the ancestor, which land is deemed to be family land. Similarly in the village community the incapacity arises from the relation between each individual member and the rest of the proprietary body as constituting together a single group, *qua* the land of the village."

In another part of the judgment the learned Judge repeated the same views in a somewhat different form as follows (pages 360-361):—" In earlier stages of development, the power of disposition, generally viewed, is under more restraint relatively than in later stages. This power like other powers, grows and expands from small beginnings. The cohesion of the family group and the conception of family property (within the community) greatly retard the expansion of the power of disposition and the disintegration of the local group. When the individual has succeeded in detaching himself from both the family group and the local group so completely that he is free to dispose of the land he holds, without assent of either descendant, kinsman or neighbour being needed, individual ownership is established and the right of pre-emption by local custom is obsolete, though an analogous right may exist, created by contract or otherwise than by custom."

" In the early stages of development of village communities, the family group and family land within the community are its most prominent features, and there is a right of *shufa* arising out of the relations between the

“ the members of the group in respect of the family land. Ordinarily no holder of family land is at liberty to make a disposition of the portion of family land which he holds that is not in conformity with the customary rule as to its devolution in the family except with the assent of those who will be affected by the act of diversion. This is seen in respect of partitions (not being merely temporary) and of gifts and of adoptions which operate as gifts, all of which are found to be liable to be annulled by the lineal descendants or the collateral kinsmen. *On breach of the primary right that a portion of family land shall not be diverted from its ordinary course of devolution, the consequential right is a right of veto, or a right to have the injurious act rescinded*; this sometimes but rarely expands into a right to take advantage of it upon equitable terms (see *Balki v. Bira* (1)). The chief difference between this *primary right of shufa*, accompanied by the right of veto, and the *primary right in what is ordinarily called pre-emption* is that in the former the personal relation between the members of the group, as a family group, is chiefly regarded, while in the latter the relation between the members of the group as an individual group of land-holders is chiefly regarded; when, as is commonly the case, the land-holding group is also a group of kindred families, the relations between the members, as being both of kin and also conjoint holders of land, become complicated; but it by no means necessarily follows that the due order of priority should present any difficulty to the land-holders, though no doubt it may do so.

“ When it is declared in a village where mortgage and sale of land are unprecedented that these acts may be done in future provided an offer is first made to the co-sharers in a specified order, this declaration does not by any means necessarily amount to or import the creation of a new right, namely the right of pre-emption, or of a new custom. All that really occurs, ordinarily is this. *The co-sharers after consideration, are agreed that these modes of exercising the power of disposition for the purpose of raising money are unobjectionable, subject, as a matter of course, to the usual restraint upon the power of disposition, namely that it cannot be exercised without the assent of all who will be affected by its exercise.*”

In another judgment delivered in the same year *Dhani Nath v. Budhu* (2) the same learned Judge in considering the

(1) 43 P. R., 1890.

(2) 136 P. R., 1894.

question whether the customary right of pre-emption dealt with under the Punjab Laws Act, 1872, is or is not a right to or in, immoveable property observes (pages 511-512):—

“ A preferential right to acquire land belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is *jus ad rem alienam acquirendam* and not *jus in re aliena*.”

“ What is really affected by the existence of the right of pre-emption is not the right, title or interest of the owner, which is precisely the same whether the land owned by him is or is not land subject to a claim of pre-emption or transfer, but the exercise of the owner's power of transfer. The owner of land so subject is restricted in the claim of the pre-emptor, he is not at full liberty to transfer to whomsoever he pleases, as he would be if the land was not subject to a right of pre-emption, until he has given the pre-emptor opportunity prescribed by law to exercise his preferential right of acquisition.”

Again at pages 511-512, the learned Judge observes:—“ If he exercises the pre-emptor's right between him and the owner, I think it becomes still more apparent that it is not a right to the land sold. A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold when sold without a proper offer to the pre-emptor, and to acquire it if he thinks fit in spite of the sale made in disregard of his preferential right. But even a decree in a suit brought for the purpose of enforcing this secondary right does not give the pre-emptor a right to the thing sold. He does not acquire that right until he has paid the price fixed in the decree within the prescribed period, and this he need not do unless he chooses. If he does so, the right, title and interest of the vendor which had meantime vested in the vendee is divested and vests in the pre-emptor and then and not till then, he has a right to the land itself. In default of such payment his right of pre-emption over the land sold is not extinguished, but he loses his preferential right in respect to the particular transaction.”

* * * * *

“ The relation which exists between the owner of property and the pre-emptor under custom, finds a parallel elsewhere, where the right of pre-emption does not spring from custom. The obligation to permit acquisition of land in a given event,

"is specifically enforced by the Courts of Chancery in favour of the person entitled to acquire, whether his right be created by contract or otherwise or by a will. (See Chitty's Equity Index, title Pre-emption)."

"Briefly the subjection of village land to rights of pre-emption, is a burden on the land in the hands of every holder of the land, and restricts his freedom of transfer, but from this burden, as it seems to me, no right to, or interest in, the land so subject arises in any other person."

My excuse for giving these rather lengthy extracts from the judgments of Sir Meredyth Plowden in *Dilsukh Ram v. Nathu Singh* ⁽¹⁾ and *Dhani Nath v. Budhu* ⁽²⁾ is that, in view of the turn which the argument has taken in this case, it is of vital importance to show what an eminent Judge of this Court, to whom more than to any other Judge the customary law of this province is indebted for a masterly exposition of its fundamental principles, understood by the right of pre-emption as known to custom. And it is noteworthy that my brother Rattigan in delivering the judgment of a Division Bench in *Lashkari Mal v. Ishar Singh* ⁽³⁾ in regard to a question which involved a discussion of the real nature and conception of the right of pre-emption quoted with entire approval the greater part of the passages I have extracted from the judgment in *Dhani Nath v. Budhu* ⁽²⁾. (See *P. R.* for 1902, page 426).

I am not aware of any decision of this Court, published or unpublished, in which the views expressed by Sir Meredyth Plowden as set out above have been demurred to or received with any reservation. I think, I may, therefore, claim that I am amply supported by weighty authority when I say that in the Punjab, broadly speaking, the primary right of pre-emption is a right possessed by one person against another entitling him to insist that, whenever that other person should intend to sell (to instance the commonest form of transfer subject to such a right) his property, he shall make the first offer of sale, in preference to a certain class of persons, to the person so entitled who has the option to accept or decline the offer, and further that if a sale is made by the intending vendor without his first making the required offer to the person entitled thereto, in favour of anyone of the said class of persons, then the secondary right of pre-emption

(1) 98 P. R., 1894, F. B.

(2) 136 P. R., 1894.

(3) 94 P. R., 1902.

to have that sale set aside and to claim substitution for the vendee accrues to the pre-emptor by way of redress for the wrong done to him.

That this conception of the right of pre-emption is in conformity with the rules of customary law prevailing in village communities, becomes still more clear when we refer to the entries relating to the *haq-i-shufa* in the *Wajib-ul-arz* of a village or, as is sometimes the case, in the *Riwaj-i-am* of a tribe, which is the true exponent of local custom. In the vast majority of instances it will be found that the entry in respect of the right of pre-emption is more or less to the effect that whenever a proprietor *intends to sell* his land, he must *offer it* first to his co-sharers; secondly, in case of their refusal, to his relations in a certain order; thirdly, to landowners in the *Patti*; fourthly, to landowners in the village; and fifthly, in case none of these persons accepts the offer, to any outsider. If the price of the subject-matter of the sale is not agreed upon between the seller and the pre-emptor (*shufi*), then it is to be settled by a *panchayat* according to the average price of land of similar quality in adjacent villages. I think I am right in saying that the above is a typical entry on the subject of pre-emption in a *Wajib-ul-arz*, which is presumptive evidence of the existence of the custom therein set out. In some *Wajib-ul-arzes* the above order is departed from; while in others, notably in those more recent as regards the date of compilation, the proprietors agree to abide by what they call the rules of law. The one feature, however, which is most prominent in these village administration papers is that the right of pre-emption is almost always spoken of as *existing prior to a sale* and as entitling the person who is vested with the right to an *offer of sale by an intending vendor*. It is very seldom that a completed sale is mentioned or referred to in connection with this right, for the feeling of the people, to which the entry in the *Wajib-ul-arz* gives but a faint expression, rebels against an alienation taking place in defiance of their wishes and is naturally averse to taking cognizance of it; and whenever such a contingency is contemplated, the right asserted is a secondary right of substitution which arises on a breach of the primary obligation cast upon every proprietor not to sell his property without first offering it to certain specified classes of individuals. The feeling I have just referred to and which lies at the

root of all custom of pre-emption, is exhibited in an intensified form when the *Wajib-ul-arz* lays down that hitherto no sales have taken place in the village but that henceforward whenever a proprietor is obliged to sell his share for necessity he must first offer it to certain persons in a specified order. An entry of that description is of the greatest value for our present purpose, inasmuch as it shows that the right of pre-emption in its inception is a right intended, in the first place, to prevent members of the proprietary body from disturbing the existing state of things *qua* property in land and in the second place, to ensure that if such a disturbance becomes inevitable then the act of the intending vendor shall go no further than enabling a co-proprietor to take his place so as to prevent a person with an inferior *status* or an outsider from claiming undeserved equality or planting himself in the village. This is fully exemplified by the entry in the *Wajib-ul-arz* that formed the subject of consideration in the Full Bench decision—*Dilsukh Ram v. Nathu Singh* (1).

From the typical entry in a village *Wajib-ul-arz* regarding the customary right of pre-emption, I now pass on to statute law which has given the sanction of Legislature to that right in this Province. The promulgation of the Punjab Civil Code in 1854 was the first attempt at a *quasi*-legislative enactment on matters of custom. Although the Code was not law in the strict sense of the term, but was simply a Manual embodying in a convenient form certain rules on matters of a civil nature for the guidance of Judicial Officers, yet it was acted upon in practice as though it were substantive law for this Province *Mussammatt Uttur Kour v. Atma Singh* (2), and it is indisputable that in regard to vital questions of custom it was chiefly based upon, and correctly represented, the feeling of the people concerned. Section XIII of that Code dealt with the right of pre-emption in a manner consonant with contemporary records of custom, and is of some historical interest, so far as the development of statute law on the subject is concerned, as containing the germs which subsequently expanded into the pre-emptive provisions of the Punjab Laws Act of 1872 and the amending Act of

(1) 98 P. R., 1894, F. B.

(2) 47 P. R., 1870.

1878. Clause 11 of section XIII of the Code runs as follows :—

* * * * *

“ Whenever any member of such community is *desirous of*
 “ *selling his share, he must offer it to the community at large,*
 “ *or to individual co-partners.* * * * *
 “ *If the price be not agreed upon privately among the parties, it*
 “ *must be referred to the Revenue authorities, who will cause*
 “ *it to be fixed by a valuation committee.* If the community, or
 “ members thereof, be not willing to accept terms thus
 “ determined, *the intending seller may dispose of the property*
 “ *in any manner he pleases. But if he have effected a sale*
 “ *without offering an opportunity of pre-emption, then the com-*
 “ *munity, or any member of it, may, within three months from*
 “ *the date of the transaction, bring a suit for rescinding the*
 “ *sale.* * * * * In
 “ villages and *qasbahs*, the site and ground occupied by the
 “ sharer in the estate, will be subject to the right of pre-emption
 “ as above described ; if *the intending seller* be a non-proprietary
 “ resident, the pre-emption pertains to the land-holding
 “ community.”

* * * * *

It will be observed that the above clause reproduces in a substantially accurate form the typical entry in a *Wajib-ul-arz* regarding pre-emption, and shows beyond doubt that the right of the pre-emptor is recognised as *existing prior to a sale*, inasmuch as the obligation is cast upon an *intending vendor* to make an *offer of his share* to the members of the village community in a certain order, and it is only when the latter has declined the offer that he is at liberty to dispose of the property in any manner he pleases. If, however, a sale actually takes place without the vendor first making the necessary offer to a person to whom such an offer should have been made, then the latter's right of pre-emption has been infringed by such sale, and the cause of action for rescinding the sale accrues to him. To make an offer of an intended sale to a determinate person, or to a person who can and should be ascertained according to a known rule of custom, and who is called the *shufti*, is obligatory upon a proprietor desirous of selling his share in the village ; the former is the person of inherence and the latter the person of incidence *qua* the pri-

mary right of pre-emption which corresponds to a primary obligation, on the breach of which by reason of a sale being made without the pre-requisite of an offer to the pre-emptor, there accrues to him the secondary right of redress which is enforced by a pre-emption suit. The pre-emptor, if any, is always in existence before the sale actually takes place, otherwise how can an *offer of an intended sale* be made to him first ; and why should a right of pre-emption accrue to him in consequence of a sale to a third person, if a pre-existing obligation on the part of the vendor to make an offer to him is not violated by such sale.

Precisely the same conception of the right of pre-emption underlies the pre-emptive provisions of the Punjab Laws Act of 1872 as amended by Act XII of 1878, which have been repealed by the Punjab Pre-emption Act, 1905. The repealed provisions in question were embodied in sections 13, 14 and 15 which ran as follows :—

Section 13.—"When any person *proposes to sell any property*
 "or to foreclose the right to redeem any property, *in respect of*
 "*which any persons have a right of pre-emption, he shall give*
 "*notice to the persons concerned of the price at which he is*
 "*willing to sell such property, or of the amount due in respect*
 "*of the mortgage, as the case may be.* * * * *

Section 14.—"Any person having a right of pre-emption in
 "*respect to any property proposed to be sold shall lose such right,*
 "*unless within three months from the date of giving such notice*
 "*he pays or tenders to the person so proposing to sell the price*
 "*aforesaid.*" * * * *

Section 15.—This section deals with the right of pre-emption arising in respect of the foreclosure of the right to redeem any property, and corresponds *mutatis mutandis* with section 14, which deals with the right of pre-emption in respect of a sale.

Then follows section 16, which lays down that any person entitled to a right of pre-emption *may bring a suit to enforce such right* on the ground, *inter alia*, that no due notice (of the *intended sale*) was given to him as required by section 13.

The above provisions of the Punjab Laws Act have been repealed by the Punjab Pre-emption Act, 1905, and have been replaced by sections 16, 17 and 18 thereof, which, with some slight modifications, reproduce the law as embodied in the provisions aforesaid. The only material difference between the repeal-

ed section 13 of the Punjab Laws Act and the corresponding section 16 of the Punjab Pre-emption Act is that, whereas under the former section the intending vendor of any property was *legally bound to give notice* of an intended sale to the persons having a right of pre-emption in respect of it, under the latter section it is *optional* with him to give such notice. This difference, however, in the language of the two sections does not import, as certainly it was not intended to effect, any change in the law, so far as the question I am now dealing with is concerned; for under both the sections the notice, whether compulsory or optional, is to be given by an *intending vendor* before he actually sells his property to any person, *to the person who have a right of pre-emption in respect thereof*. The provision *empowering or permitting* a person proposing to sell any property to give notice of the intended sale to the persons having a right of pre-emption, equally with the provision making it *obligatory* upon him to give such notice, pre-supposes that a right of pre-emption inheres in and is exercisable by some determinate person or persons before the sale actually takes place, otherwise how is it possible for an intending vendor who wishes to exercise the option conferred upon him by section 16 of the present Act to make an offer through the Court to any particular individual or to individuals with a view to save himself and the would-be vendee from the risk of a pre-emption suit. This view of an antecedent right of pre-emption, that is to say, a right existing prior to an actual sale and inhering in a determinate person, is further supported by section 17 of the Act, under which the right of pre-emption of any person is once for all *extinguished*, if after a notice being given by an intending vendor under section 16 aforesaid, such person does not, within a prescribed period, give counter-notice through the Court to the intending vendor of *his intention to enforce his right of pre-emption by accepting*, with or without qualifications, *the offer of sale*. This provision shows unmistakeably that the right of pre-emption exists before an actual sale, and that it can be, and must be deemed to be, waived if a person entitled to the right does not, after due notice given by the intending vendor, take definite steps to enforce it. If, however, no notice is given to such person by the intending vendor and the latter actually sells his property to a third person, then the primary right of pre-emption inhering in such person has been infringed, and under section 18 of the Act there accrues to him a secondary right to bring a suit to enforce the primary right.

My brother Rattigan has referred to and relied upon section 18 of the Act in support of his position that unless and until a sale "has been completed" no right of pre-emption comes into existence. With the greatest possible respect, I do not think that this is a correct view of the legal effect of that section, so far as the question under consideration is concerned. The section in question deals, not with the primary right of pre-emption, as explained above, but with the secondary right, which arises only after a primary right has been infringed. From the position and sequence of sections 16, 17 and 18 in Chapter IV of the Act, which relates to procedure, it is to my mind quite clear that whereas the first two sections deal with the primary right of pre-emption, which inheres in certain persons antecedently to an actual sale, section 18 contemplates the contingency of that right being violated by a sale being made to a person other than the persons aforesaid and lays down that upon such a contingency happening a cause of action, that is to say, a secondary right of redress, accrues to the pre-emptor. In this place I might observe that the word "pre-emptor", about the use of which my brother Rattigan seems to disagree with Mr. Justice Chatterji, has also two significations corresponding with the primary and the secondary right of pre-emption respectively. In the first place, it denotes a person to whom an intending vendor *may* give notice under section 16 of the present Act (in the same way as he was *bound* under the repealed section 13 of the Punjab Laws Act to give notice) of an *intended sale*, in order thereby to afford him an opportunity to exercise his right of accepting a preferential offer of sale; and in the second place, it denotes a person whose pre-existing right to demand an offer of sale *has been infringed by a sale being actually made* by the vendor to a third person, (*i.e.*, to a person who as against him was not entitled to such offer) and to whom, therefore, a cause of action accrues upon which he can come into Court and enforce his secondary right of substitution for the vendee.

Similarly section 4 of the Punjab Pre-emption Act, which substantially reproduces section 9 of the Punjab Laws Act, speaks, it seems to me, not of the primary right of pre-emption, but of the secondary right of pre-emption which accrues to a pre-emptor after a sale has actually taken place; and it is, in my opinion, scarcely right to argue, as was done by the counsel for the vendee in this case, that the wording of section 4 shows that the right of pre-emption comes into existence for the first time after a sale takes place, and that before such a sale

there can be no person in whom the right of pre-emption inheres. Indeed reading section 4 with sections 16 and 17 of the Act, it appears to me that its language rather points to the conclusion that a right of pre-emption as a primary or antecedent right does inhere in a person before a sale occurs; for how could such a person have, in the words of the section, "a right to acquire agricultural land * * * * *

"in preference to all other persons", and thus to avoid the sale as being invalid or inoperative as against himself if he had not the right, before that sale took place, to demand that an offer of sale should first be made to him in preference to certain other persons. The words "right to acquire" in section 4 do not necessarily mean the right to acquire by way of *substitution* for a vendee *after a sale* has actually taken place in his favour in defiance of the pre-emptor's wishes; they can also mean the right to acquire property (using the word in its general sense) in preference to other persons as soon as the owner *proposes to sell such property* and, conformably to the procedure laid down in sections 16 and 17 of the Act, gives notice of the *intended sale* to the pre-emptor, whereupon *the pre-emptor accepts the offer*, and thus exercises his right of pre-emption. The "right to acquire" property within the meaning of section 4, therefore, exists both prior to an actual sale and subsequently to it. *First*, it exists prior to a sale when the notice contemplated by section 16 is given by an intending vendor to a person having a right of pre-emption, of his intention to sell on certain terms, and when such person elects either to accept the offer or to decline it; and *secondly*, it exists subsequently to a sale when an intending vendor does not give the notice aforesaid to the person entitled to the right of pre-emption and sells to a third party, in which case such person can demand substitution of himself for the vendee, and can thus acquire the property sold in preference to him. It may perhaps be argued that this construction of section 4 is not borne out by the words "and it (the right of pre-emption) *arises* in respect of such land only in the case of sale" inasmuch as these words show that prior to a sale the right does not arise at all; but this argument involves the utter disregard of the provisions of sections 16 and 17 of the Act, and I have no doubt in my mind that, regard being had to those provisions the word "sale" in section 4 should be considered as including both a contemplated and an actual sale.

That the right of pre-emption exists prior to a completed sale is further clear from certain analogous provisions of the Revenue Law applicable to this Province. Section 53 of the Punjab Tenancy Act, 1887, lays down in substance that if a tenant having right of occupancy under section 5 of the Act *intends to transfer that right by sale*, or otherwise, he shall cause *notice of his intention* to be served on his landlord; that the landlord *may claim to purchase the right* at a value to be fixed by a revenue officer; that if the landlord pay such value within such time as the revenue officer appoints, the right of occupancy shall be extinct and the revenue officer shall put the landlord in possession of the tenancy. Section 54 of the Act similarly deals with the case of mortgagee of a right of occupancy under section 5 *proposing to foreclose* his mortgage, and confers upon the landlord a right of preferential purchase of the mortgage rights in the same way, in all respects, as if the mortgagee were the tenant to whom the provisions of section 53 apply. Section 60 lays down that if the tenant makes a transfer of a right of occupancy in contravention of the provisions, *inter alia*, of sections 53 and 54 of the Act, such transfer shall be voidable at the instance of the landlord.

These provisions of the Punjab Tenancy Act, 1887, bear a striking resemblance to the repealed sections 13, 14, 15, and 16 of the Punjab Laws Act, and to sections 16, 17 and 18 of the Punjab Pre-emption Act, in so far as they confer upon the landlord as against an occupancy tenant *a right of pre-emption* whenever the latter *intends to transfer that right by sale*, and a similar right as against a mortgagee of the rights of occupancy whenever the latter proposes to foreclose his mortgage. This right of pre-emption vests in the landlord *before a sale is actually made by the tenant*, for the latter is under a legal obligation, as soon as he forms an intention to sell his right of occupancy, to make the first offer to his landlord, who has the option of accepting or rejecting the offer so made; and it is clear that when he accepts the offer, the sale is then, for the first time, made to him by the tenant himself, and there is no substitution of the landlord in his capacity of pre-emptor for another vendee. When, however, a sale is made by an occupancy tenant to a third person without his first making an offer to his landlord and therefore in violation of the latter's antecedent right of pre-emption, he (the landlord) can step in and exercise the right of avoiding the sale, though it would seem (and herein, for reasons which are not far to seek, the Punjab Tenancy Act differs from the Punjab Pre-emption

Act), he has not the right, as the pre-emptor has in a pre-emption suit, to substitute himself for the defeated vendee so as to be able to oust the occupancy tenant from possession of his tenancy.

Similarly, Chapter VI of the Punjab Land Revenue Act, 1887, which deals with the collection of land revenue and prescribes the procedure in regard to the sale of an estate or holding for arrears of land revenue, contains provisions for the exercise of *the right of pre-emption* in respect of *an intended sale* of the estate or holding owned by the defaulter. Section 79, sub-section (1), of the Act, lays down that "the Collector shall issue a proclamation of the *intended sale*" (of the estate or holding), and sub-section (2) of the same section prescribes that "the proclamation shall also state that any person *intending to claim a right of pre-emption* must, on pain of *forfeiting the right*, give notice of his intention to the Collector before the date fixed for the sale."

Section 87 lays down, *inter alia*, that any person who has given notice of his intention to claim a right of pre-emption under section 79, sub-section (2), may, on the day on which the sale takes place, claim to take the property on certain terms. These provisions of the Punjab Land Revenue Act clearly indicate that before the sale of an estate or holding actually takes place for arrears of land revenue, a right of pre-emption in respect of the same does in certain cases inhere in certain individuals, and that those individuals lose their right of pre-emption if they do not give notice of their intention to exercise that right, before the date fixed for the sale, in answer to the proclamation of the intended sale, which has to be issued by the Collector reserving their right of pre-emption. These provisions would be meaningless if, as a matter of law, a right of pre-emption did not exist before a completed sale, for it is obvious that in that case no person could claim a right of pre-emption in respect of an intended sale, and it would therefore be useless for the Collector to state in the proclamation of such intended sale that, unless a person intending to claim a right of pre-emption gave notice of his intention before the date fixed for the sale he shall forfeit his right. There can be no forfeiture of a right before that right actually accrues, and it logically follows that if a right of pre-emption can be forfeited before a sale takes place it must have come into existence before that sale.

The provisions of the Punjab Laws Act (now repealed), of the Punjab Pre-emption Act, of the Punjab Tenancy Act, and of the Punjab Land Revenue Act which I have discussed above at some length, leave no doubt in my mind that the primary or antecedent right of pre-emption exists before and independently of an actual sale ; that it inheres in a determinate person or determinate persons or, at all events, in a class of persons that can be ascertained ; and that it is only when the primary right of the pre-emptor is infringed by a sale in favour of a third person that his secondary right of redress in the shape of claiming substitution of himself for the vendee arises.

Before I proceed further, I think it would not perhaps be without some interest to recall in this place certain rules of the Roman Law which are analogous to the customary right of pre-emption as known to us in the Punjab, and some of which very closely resemble the provisions of the Punjab Tenancy Act which I have set out above. It was not an unusual stipulation to embody in a Roman contract of sale that if the purchaser thought of selling the property the vendor should have a right of pre-emption, either on terms offered by a third person who might be willing to buy the property, or on terms agreed upon when the original contract of sale was made. This right of pre-emption which inhered in the seller before a re-sale by the purchaser actually took place was known as *pactum protimiseos* (Moyle, *Contract of sale in Civil Law*, page 176 ; Hunter's *Roman Law*, 2nd Edition, page 503, Mackintosh's *Roman Law of Sale*, 2nd Edition, page 127). The pre-emptor had the privilege of the first refusal, i.e., he was entitled to an offer of sale in preference to all other persons ; and it was only when he declined to avail himself of the offer that a sale to a third party could take place. The relationship that was thus created by an express stipulation in a Roman contract of sale, is in this Province created by custom or by statute law which codifies custom and is a necessary incident annexed to a sale of land or other property situate in a village or in a town where the custom of pre-emption prevails. The rule of pre-emption also prevailed among the Romans in respect of the alienation of a perpetual tenure of land which was termed *emphyteusis* and which bears a striking resemblance to a right of occupancy dealt with in the Punjab Tenancy Act. The person who was the owner of the land in respect of which an *emphyteusis* was created was called the *dominus emphyteuseos* and the person to whom an *emphyteusis* was granted was called *emphyteuta*. The *emphyteuta* had power to

alienate the *emphyteusis*, but subject to this condition that the consent of the *dominus* was necessary to the alienation, and he had a right of pre-emption in respect of it. The proceedings to be adopted were prescribed by Justinian, and it will perhaps greatly interest the student of our revenue law to know that the provisions of section 53 of the Punjab Tenancy Act were, to a great extent, anticipated by the great Roman legislator. The *emphyteuta* who proposed to sell the *emphyteusis* was bound to transmit to the *dominus* formal notice of the sum that a purchaser was willing to give for it. The *dominus* had two months to decide whether he was going to take the *emphyteusis* at that sum, and if he wished it, the transfer had to be made to him. If he did not buy at the price named within two months, the *emphyteuta* could sell to any fit and proper person without the consent of the *dominus*. The *dominus* was bound to accept such person as his *emphyteuta* and admit him into possession of the land (Hunter's *Roman Law*, page 429). These rules, as I have already explained while dealing with the analogous provisions of the Punjab Tenancy Act and the repealed sections 13 and 14 of the Punjab Laws Act, very clearly indicate that the right of pre-emption in its essence and inception is the privilege of the first refusal and as such exists and inheres in a determinate person antecedently to an actual sale.

The true nature of the right of pre-emption considered in this aspect is also made clear by reference to the doctrine of waiver in respect of this right as established in this Province. It has been settled by a long course of decisions in our Court that a right of pre-emption can be, as it frequently is, waived before an actual sale takes place, *i.e.*, in respect of an intended sale of the property which is subject to such right. On this point there is a sharp contrast between the Muhammadan law of pre-emption, on the one hand, and the rules of custom and Statute law that govern pre-emption in the Punjab, on the other. Under the Muhammadan law a right of pre-emption cannot be abandoned or waived unless an agreement to sell has already been entered into, for under that system of law the offer of purchase has to be made to the pre-emptor after the contract of sale has been concluded between the vendor and a third party, and there can be no waiver of an offer until after an offer is actually made (see *Pearee Lall v. Ajo dhya Pershad* ⁽¹⁾, *Mehar Chand v. Hurdeo* ⁽²⁾, *Gobind Dayal v.*

¹ 74 P. R., 1869.

⁽²⁾ 30 P. R., 1870.

Inayatullah (1) at pages 804-805, *Konhai Lal v. Kolka Prasad* (2). Under the Punjab Pre-emption Act, on the other hand, which, as we have already seen, reproduces in this particular the repealed provisions of the Punjab Laws Act, as also the rules of custom embodied in a typical village *Wajib-ul-arz*, the right of pre-emption can be waived before a contract of sale is entered into, for the owner of property subject to such right has the option (as under the old law he was bound) to make an offer of his property to the persons having a right of pre-emption in respect of it as soon as he proposes to sell such property and before he concludes a contract of sale with any particular individual. Once such offer is made by an intending vendor to a person having a right of pre-emption in respect of the property he proposes to sell, and the latter does not accept the offer in accordance with the conditions laid down by law, the right is deemed to have been waived and is finally extinguished. In *Nabbi Bakhsh v. Kaka Singh* (3) the doctrine of waiver, as applicable to a right of pre-emption before a sale actually takes place, is thus explained by Mr. Justice Plowden:—"The pre-emptor who has waived his right to "an offer could not maintain a suit against the original "purchaser.

* * * * *

"His right is to have an offer made to him and to have "the option of accepting or rejecting that offer within a "reasonable time. He cannot say: 'I waive my right in "favour of a particular person and reserve as against all "others.' He must make his election and accept or reject "the offer absolutely and without reservation once for all."

In spite, however, of the great difference which I have just explained (in regard to the question of the waiver of his right on the part of the pre-emptor) between the Muhammadan Law of pre-emption and the Punjab Pre-emption Act it is noteworthy that under the former system of law as under the latter Act the right of pre-emption does exist before a sale actually takes place; and this, in my opinion, very materially strengthens the position of the plaintiff-pre-emptor in the present case. It will, I think, be hardly disputed that in the history of the development of legal notions, the Muhammadan law, as a system of

(1) *I. L. R.*, VII All., 775. (2) *I. L. R.*, XXVII All., 670.

(3) 42 P. R., 1878.

positive regulations, marks a much later period of evolution than the customary rules which have prevailed from times immemorial in village communities in the Punjab. In one respect the contrast between the two bodies of rules is as pronounced as it is instructive. The conception of individual ownership which, as I have shown above, is conspicuous by its absence in the earlier stages of development of a village community, is present in full vigour at the very commencement of an attempt on the part of Muhammadan jurists to evolve a coherent system of laws, with the result that the residuary interest of all the members of a proprietary group in the property possessed by each and the consequent right of veto or control residing in them as regards his power of disposition, which is so familiar a feature of our customary law, is unknown to the Muhammadan lawyer. The institution of customary pre-emption is not, therefore, in all its aspects identical with pre-emption as known to the Muhammadan law, the chief ground of distinction being that, whereas under the Muhammadan law pre-emption, as the word *shufa* itself denotes, is based upon conjunction of the vendor's property with that of the pre-emptor, and its main object is to prevent inconvenience arising from the introduction of strangers, the customary right of pre-emption is primarily founded upon the pre-emptor's right, inherent in him as a member of a landowning group holding property with the vendor in joint ownership, to prevent the latter from dealing with that property so as to disturb the normal course of its devolution and thus to preserve the integrity of the village community. Considered from a slightly different point of view, pre-emption under the Muhammadan law postulates the existence of a free power of transfer and is intended only to neutralize the evil effects of such power taken in connection with the privacy of family life and with the minute subdivisions of property resulting from the unfettered operation of the law of inheritance; while customary pre-emption presupposes and springs from a state of society in which the owner's power of disposal of property is at first absent and in later times very much restricted, and represents a convenient compromise between the conservative feeling of the village community struggling to keep intact the nexus of joint ownership and kinship in blood, on the one hand, and the inevitable tendency towards social disintegration and the growth of individual property, on the other. Pre-emption under the Muhammadan law is, properly speaking, as evidenc-

ed by its actual working in practice, a town institution ; while customary pre-emption, as known to us in the Punjab, is in its inception a village institution, intimately connected with the origin and development of village communities. If, then, it can be shown that even under the Muhammadan law the right of pre-emption exists before sale, *i.e.*, that it does not come into existence for the first time after a sale to a particular individual has taken place, a great step will be gained towards establishing the proposition that *à fortiori* under the Punjab Pre-emption Act, which codifies custom, the aforesaid right does exist antecedently to an actual sale.

The question of the right of pre-emption under the Muhammadan law existing prior to a sale has been discussed by that most eminent Judge, Mr. Justice Mahmud, in one of his luminous judgments with such perspicuity and acuteness of thought, and the observations made by him in the course of that judgment are so apposite to the discussion before us, that I feel that I am justified in extracting from it, in support of my position, a few passages which have a direct bearing upon the question under consideration. I allude to the well-known case of *Gobind Dyal v. Inayatullah* (1).

In *Sheikh Kudratullah v. Mahim Mohan Shaha* (2) upon a reference to a Full Bench on the question whether a Hindu vendee from a Muhammadan vendor was bound by the Muhammadan law of pre-emption in a suit brought by a Muhammadan pre-emptor, the majority of the learned Judges of the Calcutta High Court in answering the question in the negative, adopted the view of Mr. Justice Dawarka Nath Mitter as to the nature of the right of pre-emption under the Muhammadan law, which he expressed in the following words :—“ A right of pre-emption “ is nothing more than a right of repurchase, not from the vendor “ but from the vendee, who is treated, for all intents and purposes, “ as the full legal owner of the property which is the subject- “ matter of that right. There is nothing whatever in the “ Muhammadan law, so far as I am aware of, which imposes “ upon any one the obligation of making the first offer to his “ neighbour or coparcener before he can sell his property to a “ stranger ; nor is there anything to show that the right of pre- “ emption is based upon any such obligation, the non-fulfillment “ of which would prevent the stranger from acquiring a complete “ and valid title in the property by virtue of his purchase.” The

(1) *I. L. R.*, VII All., 775.(2) 4 *B. L. R.*, 134, F. B.

case before the Allahabad High Court, *Gobind Dayal v. Inayatallah* ⁽¹⁾, in which Mr. Justice Mahmud delivered his judgment, from which I am going to quote, was also a Full Bench reference in which the question referred was precisely identical with the one which the Calcutta High Court had had to consider in *Sheikh Kudratullah's* case, and the conclusion unanimously arrived at by the learned Judges of the Allahabad High Court was contrary to that embodied in the judgment delivered by Mr. Justice Mitter. The authorities of the Muhammadan law and the reasoning upon which the judgment of that learned Judge proceeded were exhaustively examined by Mr. Justice Mahmud, and he showed that the main reason why the majority of the Judges of the Calcutta High Court, who had adopted Mr. Justice Mitter's view, had come to an erroneous conclusion upon the question referred to them, was that they had misconceived the true nature of the right of pre-emption under the Muhammadan law. After summarising the grounds upon which the judgment of Mr. Justice Mitter is based, and after quoting the definition of the right of pre-emption, as given in the passage which I have already extracted from that judgment, Mr. Justice Mahmud analyses the nature of the right of pre-emption under the Muhammadan law and arrives at the conclusion that "the right of pre-emption is *not a right of re-purchase* either from the vendor or from the vendee, involving "any new contract of sale; but it is simply a *right of substitution*, entitling the pre-emptor, by reason of a legal incident to "which the sale itself was subject, to stand in the shoes of the "vendee in respect of all the rights and obligations arising from "the sale under which he has derived his title. It is, in effect, "as if in a sale-deed the vendee's name were rubbed out and "the pre-emptor's name inserted in its place." This definition of the right of pre-emption has been consistently approved of and adopted by our own Court (see *Uddham Mall v. Ganda Mall* ⁽²⁾, page 465; *Kalu v. Bhupa* ⁽³⁾, page 169; *Hakam Singh v. Indar* ⁽⁴⁾, pages 165-166; *Abdulla v. Amir-ud-Din* ⁽⁵⁾ page 303; *Bogha Singh v. Gurmukh Singh* ⁽⁶⁾, page 413); and my brother Rattigan himself has accepted it in the present case without any qualification. I may, therefore, take it that the necessary steps leading to this definition, as explained by Mr. Justice Mahmud in his judgment, and the legal conceptions underlying his reasoning, will hardly be disputed. Mr. Justice Mitter's

(1) I. L. R., VII All., 775.

(2) 134 P. R., 1889.

(3) 30 P. R., 1893.

(4) 46 P. R., 1902.

(5) 76 P. R., 1902.

(6) 93 P. R., 1902.

view that the right of pre-emption is "a mere right of re-purchase from the vendee" was based on the proposition that under the Muhammadan Law this right does not exist before sale, because, on the one hand, the vendor is under no legal obligation to offer the property for purchase to the pre-emptor before selling it to a third person, and, on the other hand, the pre-emptor has no right of forbidding the sale by the vendor, who is under no legal disability in respect of his power of sale, such sale being no infringement of a pre-existing right of pre-emption. Mr. Justice Mahmud controverts this proposition and shows that it is based upon an erroneous interpretation of the original authorities of the Muhammadan law. After discussing those authorities in detail he observes as follows:—"It is unnecessary to quote any more passages from the original Arabic text of the *Hedaya*, which distinctly go to show that the cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement, that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, that the right exists antecedently to sale, and that sale is a condition precedent not to the existence of the right but only to its enforceability" (p. 891). Again, at pages 802-803, the learned Judge says:—"These texts leave no doubt in my mind that the cause or foundation of pre-emption is 'conjunction' of the pre-emptor's property with that of the vendor, and, inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised. For example, when two Muhammadans own shares in a house, the share of each may in turn be regarded as dominant or servient to the other for purposes of pre-emption, because the conjunction of the properties of the two owners being a circumstance common to both, alternately entitles the other to claim pre-emption when the proper occasion arises, that is, when either transfers his share by sale. The analogy of a non-apparent easement again suggests itself. It is true, as Mitter, J., says that neither can prevent the other from selling his share to whomsoever he pleases, because the Muhammadan law 'nowhere recognizes any right of veto in the pre-emptor', nor does it impose any 'positive legal disability' on the vendor in this respect. This, no doubt, at first sight suggests a distinction in principle between pre-emption and non-apparent easement, such as a right annexed to A's house to prevent B from building on his own land. But the distinction, so far as the question

“of the origin of the right is concerned, is in reality not one of principle but of detail, arising from the difference in the nature of the occasion demanding the exercise of the right. In the one case that occasion is sale, in the other, it is building. Now, it is true that in the one case the pre-emptor cannot prevent his coparcener from selling his property to a stranger, whilst in the case supposed, A could prevent B from building on his land. But the reason of the distinction is not that the right of the one did not exist before the sale, and the right of the other did exist before the building. The reason is this. The object of the non-apparent easement possessed by A is the beneficial enjoyment of his own property, and definite infringement of that right is ascertained when B takes any definite action to build upon his land, a state of things which would be sufficient to afford a cause of action in favour of A, seeking preventive relief or other assertion of his right of easement. But in the case of pre-emption, the object of the right is to prevent the intrusion, not of all purchasers in general, but only of such as are objectionable from the pre-emptor's point of view.” * * * It is obvious, then, that before a pre-emptor can make up his mind to assert his pre-emptive right, he must, *ex necessitate rei*, know definitely who the purchaser is, and under what terms he has purchased the property.”

* * * *

“No such considerations exist in the case of the right of easement which I have supposed by way of illustration. And it follows that before a sale is actually completed the pre-emptor is not *ex necessitate rei*, in a position to have definite information as to whether the proper occasion has arisen for the exercise of his already existing pre-emptive right. This is the reason why the law gives him no right of vetoing the sale. But the reason falls far short of showing that his right of pre-emption was wholly non-existent at the time of the sale, when the title of the purchaser was created.”

Proceeding further, the learned Judge examines the grounds upon which the Muhammadan jurists hold, as I have mentioned above, that the pre-emptor is incapable of relinquishing his pre-emptive right in respect of a contract of sale which has not yet taken place, and then observes as follows:—

“Whatever the merits of this reasoning from a jurisprudential point of view may be, I confess I fail to see

“ how it supports the view that the right of pre-emption
 “ does not exist as a restriction or qualification of the right
 “ of sale possessed by the owner of property subject to pre-
 “ emption. It is indeed not an *absolutely unqualified disability*
 “ *ty*, for it does not absolutely prohibit sale without the
 “ consent of the pre-emptor. But that it amounts to a
 “ *qualified disability, distinctly operating in derogation of the*
 “ *vendor's absolute right to sell the property, and thus affects his*
 “ *title, which would otherwise amount to absolute dominion,*
 “ cannot, in my opinion, be doubted. That the results of
 “ such restrictions or qualifications are dependent for their
 “ enforcement upon the occurrence of the actual sale, is a
 “ circumstance which, in my opinion, does not affect the
 “ question relating to the inception of the right of pre-
 “ emption.”

The learned Judge next proceeds to consider whether under the Muhammadan Law the vendor is under a legal obligation to make the first offer of his property to his neighbour, and whether the sale, if made to a third person without such preliminary offer, is legally defective. After examining some original Arabic texts bearing upon the question, he remarks on page 808 :— “ The law, therefore, as it stands, does not oblige the
 “ vendor to give notice of the projected sale to the pre-emptor,
 “ nor does it vitiate a sale executed without his permission. But
 “ it is perfectly clear from these traditions that *the very conception*
 “ *of pre-emption in Muhammadan Law necessarily involves the*
 “ *existence of the right before the sale in respect of which it may*
 “ *be exercised.* All that the interpretation of the Muhammadan
 “ jurists goes to show is, that the sale is not vitiated by the
 “ absence of the pre-emptor's consent,—an interpretation which,
 “ whilst it is perfectly consistent with the rest of their method
 “ of reasoning in dealing with pre-emption, again falls short of
 “ establishing the proposition that the right is not antecedent in
 “ existence to the sale complained of by the pre-emptor.”

The above abstracts from the judgment of Mr. Justice Mahmud are, I think, sufficient to establish that under the Muhammadan law the right of pre-emption exists before sale, which, constituting, as it does an infringement of that right, affords an occasion for its exercise, and gives rise to a cause of action upon which a pre-emption suit can be brought. If this be the nature of the right of pre-emption under the Muhammadan law, then for the reasons I have already set out in detail *a fortiori* under the Punjab Pre-emption Act, which, as I have

shown, codifies custom in this respect, the right of pre-emption must exist antecedently to a sale. It exists without being exercised so long as a sale of property subject to such right is not contemplated. When such sale is contemplated and an offer of the property is made by the intending vendor to the person to whom, according to custom as recognised by law, such offer must be made, then the right is respected, and if the offer in question is accepted the right is duly exercised and the sale takes place in full recognition of that right. When, on the other hand, the necessary offer is not made to the person entitled to such offer, and a sale is made in defiance of his right in favour of a person who, as against him, is not entitled to an offer of the property, then his right of pre-emption is infringed, and he can, if he so chooses, enforce that right by suit. It follows, therefore, that a right of pre-emption is as definite and palpable a right as any other legal right, though it is distinguishable from many other rights in its peculiar characteristics, and that whenever it exists it always inheres in some determinate person or persons, and is available against a known person or some persons who can be ascertained. I deny that this right is claimed to be of "a nebulous and indefinite character, existing apart from any determinate person of inherence and unattached to any particular thing;" and, with all possible deference, I do not think that my brother Rattigan is right in imputing to Mr. Justice Chatterji such a view of the nature of the right in question. From the fact that when a sale takes place in favour of a particular person, a right of pre-emption *may*, but that it does not *necessarily*, accrue to another particular individual, it by no means follows that such right cannot exist before sale. It is obvious that if the sale is made "to a person against whom no one else has a superior right of purchase," nobody's right of pre-emption is violated, for to no body other than the purchaser was the vendor under an obligation to make the first offer. If, however, there is in existence some person to whom such offer has to be made by the intending vendor, but to whom no such offer is made, and a sale takes place in favour of a third person, it is then that a pre-existing right of pre-emption is infringed. There are doubtless cases in which an alleged right of pre-emption is said to inhere in some person or persons as against another or others, but in which, as a matter of fact, it does not so inhere, and upon proper occasion arising, it turns out on close examination to be illusory. But surely it does not follow from this that there are not other cases in which the right

is a real one inhering in some determinate person or persons and attaching to a particular kind of property, and that in those cases the sale to a third person does not infringe that right. The former class of cases fall within the category of what Professor Holland aptly describes as "apparent infringements." "It is necessary to observe," says Holland, "that what might appear to be an infringement of a right often turns out upon investigation not to be one. This may be the case, because the apparent act is no act at all, or because it is not the true cause of the damage complained of, or because the right which seems to have been infringed has been waived, or because the right has been forfeited, or is disallowed on grounds of public policy." Putting aside therefore, cases of apparent infringements of a right of pre-emption, which do not affect the question before us, it seems clear to my mind that whenever such right arises upon a sale actually taking place, it does so arise, and can only arise, because before the sale a primary right resided in the person in whose favour the secondary right accrues by reason of the sale, which only affords an occasion for the exercise of the right. The right which is thus exercised after the sale is the secondary or remedial right arising upon the infringement of the primary or antecedent right, and I fail to see why it should be said that there is a *non sequitur* when from the admitted existence of the secondary right the existence of the primary right is inferred. Once the precise nature of the right of pre-emption accruing after a sale is fully understood, it follows *ex necessitate rei*, as I have explained above, that that right must be preceded by a right existing before the sale, for it is impossible to conceive of the one circumstance of sale giving rise simultaneously to a right and to a cause of action which means the infringement of a right. If the sale be not a violation of a pre-existing right how can it afford a cause of action, which always involves specific ground of complaint for the breach of a definite obligation corresponding to a definite right, and if it does not afford a cause of action in the correct sense of that phrase, how can the pre-emptor seek redress in a Court by asking for the avoidance of that sale?

Of the two kinds of right which have been instanced by my brother Rattigan as examples of a right of a definite character inhering in a definite person and exercisable in a definite way, *viz.*, a right of ownership in a disused barn and a right of easement over another person's property, the latter kind of right is the one to which a right of pre-emption is to some extent analogous, as has been fully explained by Mr. Justice Mahmud in

one of the passages in his judgment in *Gobind Dayal's* case which I have quoted above. As that learned Judge has shown, the objects of the two rights are different, and the distinction between the two rights, which is not one of principle but of detail, arises from the difference in the nature of the occasion demanding the exercise of each right. The example given by my learned brother is of a discontinuous apparent easement, while that given by Mr. Justice Mahmud is of a continuous non-apparent easement, and it is instructive to note the difference in the matter of the enjoyment and exercise of the right between these two kinds of easement. A discontinuous apparent easement is one, the existence of which is shown by some visible sign and which needs some definitive act for its enjoyment, *e.g.*, a right of way annexed to A's house over B's land ; whereas a continuous non-apparent easement is one, the existence of which is not so shown and whose enjoyment is continued without some definite act, *e.g.*, a right annexed to A's house to prevent B from building on his own land. It is to this latter kind of easement that the primary right of pre-emption bears a close resemblance, so far as the nature of the right is concerned, for in both cases the right exists and is enjoyed apart from its existence and enjoyment being evidenced by overt acts of its exercise, and it is only when the right is infringed by some positive act being done in derogation of it by the person of incidence that the occasion arises for the first time for its overt exercise by the person of inherence. For example, in the case of the non-apparent easement specified above, the owner of the dominant tenement by virtue of the right inhering in him does no positive acts upon the servient tenement, and the enjoyment of his right is not shown by any such acts being done. His right of easement is that of a negative, as contradistinguished from a positive, easement. He is entitled to the right, not to do something himself on the servient tenement, but to prevent something being done thereon, which imposes a corresponding obligation upon the servient owner to refrain from doing something on it which would interfere with the dominant owner's right of enjoyment in reference to the same. The latter's right is nevertheless as definite and palpable as the right of easement possessed by a person who has, for instance, a right of way over another person's land, which is enjoyed from time to time by means of visible acts. Similarly, a primary right of pre-emption is in its inception, not the right to do something in reference to another person's property, but to prevent that person from selling it without first offering the same to the person entitled to the right,

and in that respect it resembles a negative non-apparent easement. The occasion, however, for the exercise of the right by means of an overt act arises in both the cases when some positive act is done in derogation of the right by the person against whom it is available. In the case of pre-emption that act is sale to a third person, and in the case of a non-apparent easement (as instanced above) it is building on the servient tenement. The sale or the building, however, as the case may be, constitutes an infringement of the primary right, and gives rise to a secondary right of redress against the person against whom the primary right was available. It is, therefore, clear that the right of pre-emption is not the less a legal right and not the less existent and enjoyable as a primary right before a sale, because its exercise is not manifested by overt acts until a sale takes place. When a sale takes place the right is violated, and then and then only does there arise an occasion for putting it into operation in the shape of a secondary right of redress for the wrong done.

From the foregoing discussion it is, I think, clear that the right of pre-emption in its essence is a right that exists prior to sale, and as it is a right, generally speaking, not created by agreement of the parties, we may describe it in the language of jurisprudence as "an antecedent right *in personam* arising *ex lege*" (Holland, page 201), and as such giving rise to a corresponding antecedent obligation. With regard to this right the "collative investitive facts" of which my brother Rattigan has spoken, are, *not* "a sale and a sale to a certain person," but, under the Muhammadan law, conjunction of the pre-emptor's property with the vendor's, and, under the Punjab Pre-emption Act, relationship, joint ownership, and a definite proprietary association, with regard to land, between the members of a community in a village, and vicinage to a greater or less extent in a town; in a word (so far as this Province is concerned), any facts by reason of the existence of which the right of pre-emption vests in certain classes of persons under sections 12 and 13 of the Act. A sale cannot be a "collative investitive fact" as regards a primary right of pre-emption, for the simple reason that it, so far from vesting any such right in the pre-emptor, infringes that right, and amounts to a breach of the primary obligation cast by law upon the vendor.

A few concrete instances will, perhaps, serve to define clearly the position which I am persuaded to adopt in regard to the nature of the right of pre-emption, and they will also, I believe, afford a criterion by which we may

judge how far my brother Rattigan's view as regards that right is sustainable. Suppose A and B, two childless proprietors, are brothers and jointly own a plot of agricultural land in a village in equal shares. The statutory right of pre-emption that prevails in the village means, if it means anything at all, that each of the two brothers A and B possesses as against the other *qua* his half share in the joint holding the right that that other shall abstain from selling that share without first offering it to him. This is the primary right of pre-emption, and being a reciprocal right inheres in each brother against the other. Each is in turn the person of inherence (or the person entitled) and the person of incidence (or the person obliged), the object of the right is alternately the half share owned by each, and the act or forbearance which each is entitled to exact from the other is that the latter shall first offer the said share to the former, and shall refrain from selling it to a third person without making such preliminary offer to him. Here we have the primary right of pre-emption in its simplest form, and this right obviously exists and must exist before sale. If, however, any one of the two brothers at any time sells his half share to a third person without first offering it to the other, the latter's right of pre-emption is infringed and a secondary right of substitution for the vendee accrues to him. If either A or B happens to have a son, or if both have sons, the matter becomes more complicated, as the inherence and the incidence of the right of pre-emption and its operation have to be viewed with reference to several parties and several possible ways of the infringement of the right, but the constituent elements of the original right remain always the same, though the process of analysis becomes comparatively more difficult. The right vests in each against all the others, and the corresponding obligation is laid upon all in favour of each. If we enlarge this small family group by taking into account the existence of other landowners in the village, holding lands either jointly, or severally, the fundamental operation of the right of pre-emption within this extended circle remains unchanged, and each co-sharer or individual proprietor knows or is supposed to know to what other co-sharers or proprietors, either singly or collectively, he is required by custom as recognised by law to make the first offer of his property as soon as he proposes to sell it. The rule that determines the order in which such offer has to be made to a large number of landowners, amounts, in its simplest form, to this that it must be made to each and all of those persons who in the order of

precedence stand *above* the person to whom the sale is intended to be made. If any one of those persons, according to his position, in order of precedence, accepts the offer, the sale must be made to him and cannot be made to another person occupying a relatively inferior position. If, however, none of the persons entitled to the preliminary offer accept it, then and then only can the intending vendor sell it to whomsoever he pleases. As a matter of legal analysis, it is by no means an easy task to point out, before a sale actually takes place to a particular individual, who are the persons whose pre-existing right of pre-emption will or will not be infringed by an intended sale; and the difficulty is enhanced in practice by the fact that in the vast majority of instances such sale takes place without the vendor complying with the pre-requisite of an offer to the person or persons entitled to exact such offer. But the practical difficulty of the analysis affords no ground for denying the existence of the antecedent right, which impresses itself upon our consciousness most clearly when it is violated, but which is not the less existent because in certain instances the obligation corresponding to it is fully discharged by an offer and a consequent sale being made to the person entitled to the right. Judged by the tests laid down above, the difficulty, to which my brother Rattigan alludes, of knowing before a sale actually takes place who will be entitled to pre-emption in respect of the property proposed to be sold turns out to be more imaginary than real. To take the example given by him in reference to clauses (a), (b) and (c) of section 12 of the Punjab Laws Act. If A, an owner of agricultural land, proposes to sell it, then if the sale is intended to be made to a non-proprietor in the village, each of the persons specified in clauses (a), (b) and (c) of section 12 can predicate of himself that he has a right of pre-emption as against the would-be vendee. If the intention be to sell to a person falling under clause (c), then each of the persons mentioned in clauses (a) and (b) would have such a right against him; and if to a person falling under clause (b), then the right would inhere in a person specified in clause (a). And this right is the primary right of pre-emption, which always exists before a sale is actually made, and which casts upon A the legal obligation to offer the land, before actually selling it to any one of the persons specified in any one of the clauses aforesaid, to each and all of the persons mentioned in the clause or clauses preceding it. Even an occupancy tenant certainly has a pre-existing right of pre-emption in respect of A's land, which right consists in this, that he is entitled to the first offer of the land if it is not indeed actually sold,

but proposed to be sold to a tenant-at-will or to a non-proprietor, but he has no such right if the intention be to sell the land to any one of the persons specified in clauses (a) and (b), and in sub-clauses *first*, *second*, and *third* of clause (c). If an occupancy tenant has no right of pre-emption at all before an actual sale to a stranger or to a tenant at-will, I fail to see how he can bring a pre-emption suit against such a vendee after the sale, for unless his antecedent right to an offer of land before sale has been infringed by the sale in question, he can have no cause of action by reason of the sale upon which he can come into Court.

Next, suppose in a town in which the custom of pre-emption prevails, A and B are joint owners of a house in equal half shares. Each of the two co-owners has undoubtedly a right of pre-emption against the other as regards his half share of the house before a sale thereof actually takes place, *i.e.*, each is entitled to an offer of sale by the other as soon as that other proposes to sell his share. Each is thus in turn the person entitled and the person obliged; and the object of the right and the act or forbearance which the one is entitled to exact from the other, are identical with those that have already been discussed in connection with an intended sale of agricultural land situate in a village. This is an instance in a town of the existence of the primary right of pre-emption in a simple form, and this right obviously exists before sale. For, if A were to propose to sell his own share and wanted to avoid the risk of a pre-emption suit by observing the procedure prescribed in sections 16 and 17 of the Punjab Pre-emption Act, to whom should he give notice of the intended sale? Section 16 lays down that such notice is to be given to the persons having the right of pre-emption in respect of the property proposed to be sold. And who are the persons that fall within this category in the case given? Surely, the very first person is the co-sharer B, to whom therefore an offer must be made before a sale is made to another person. Next to him will come, say C, who has a common entrance from the street with A and B, and next to him again D, the owner of a house which is dominant *qua* the house in question and so forth in the order prescribed in section 13 of the Act. If a sale of half the house is proposed to be made by A to a stranger, each of the three persons B, C, and D is in the prescribed order of priority, entitled to an offer of sale; if the intention is to sell to D each of the first two persons B and C is so entitled; and if to C, then B is the only person to whom such offer need be made.

If the sale is intended to be made to B, none else is entitled to a prior offer, for the simple reason that B is, of all persons in whom the right of pre-emption inheres, entitled to the very first offer, and when the offer is made to him and is followed by a sale, his right is fully recognised and respected by A.

These few simple instances, which being free from accessory complications are comparatively easy of comprehension, suffice, I think, to show that whenever in a village, as also in a town in which the custom of pre-emption prevails, the right of pre-emption is said to exist in respect of a particular description of property, it always exists before sale and inheres in some determinate person or persons and is available against another determinate person or determinate persons. Whenever a sale is actually made either in a village or in a town to a person other than the person entitled, it amounts to a violation of the latter's primary right and gives rise to a secondary right in his favour which can be enforced by a pre-emption suit.

The foregoing discussion clears the ground for the purpose of answering the present reference. I take it that (to use the letters of the alphabet employed by my brother Rattigan to illustrate the facts of this case) if the vendor had, instead of selling to the vendee X by one and the same sale-deed the two houses A and B, sold to him only the house in suit (B), the pre-emptor Z, by virtue of his ownership of house C, would have been entitled to a right of pre-emption in respect of house B. This means, for the reasons already fully set out, that before the sale was actually made to X, Z had a right to an offer of it from the vendor; in other words, that the latter was under a legal obligation to make the offer to Z. I also take it that, if the house in question had been actually sold to X without the necessary offer having been made to Z, a right of another kind, a remedial right, would have accrued to the latter on the ground that his antecedent right to an offer had been infringed, and he would have been entitled to come into Court to enforce his right of pre-emption. This means, if it means anything at all, that before the sale was made in favour of X, he was not entitled to an offer of the house B from the vendor, whereas Z was so entitled; in other words, that Z had a preferential right of purchase as against X. If that be conceded, and I do not see how in view of the above discussion this can be disputed, then the crucial question that arises for consideration is this:—Does the mere fact that the vendor sells to X, not the house B alone but both the houses A and B by one and the same deed of sale,

divest Z of the undoubted right of pre-emption which he had in respect of house B before such sale, and which he would have been able to enforce if house B alone had been sold? Before the sale of the two houses, Z clearly had a right of pre-emption in respect of house B; but he had no such right in respect of house A; while, on the other hand, X had no right of pre-emption at all in respect of either house. Does the mere fact of house B being sold to X, together with house A, on the one hand, deprive Z of his pre-existing right of pre-emption in respect of house B, and, on the other hand, confer upon X some kind of right, call it what you will, which places him on the same footing, *qua* his purchase of house B, with Z?

I confess, I find it impossible to answer this question in the affirmative, for I cannot conceive how by the mere accident of house B being sold simultaneously with house A to the vendee X, he is enabled to say to Z—"No doubt before sale you had a right of pre-emption in respect of house B, and the vendor in order to extinguish your right should have made an offer of the house to you in the first instance, but now that I have purchased house A, as regards which you had no right of pre-emption (and as regards which I myself had no such right), together with house B by one and the same sale-deed, you have forfeited your right in respect of the latter house; and by reason of the sale I occupy a position of absolute equality with you." This contention would be perfectly intelligible, if before the sale in question Z had no right of pre-emption in respect of house B, but that position is, as I have endeavoured to show, in my humble judgment, untenable; and it logically follows that X cannot, by merely purchasing the two houses A and B together, instead of house B alone, defeat Z's pre-existing right as regards the house in question. The weakness of the vendee's contention becomes still more clear when we look at the matter in another way. Suppose that instead of houses A and B being sold by one sale-deed to X alone, they were sold under one deed separately to two persons X and Y—house B to X and house A to Y. If then Z brought a pre-emption suit against X as regards house B, could X plead that because houses A and B were sold at one and the same time and by the same sale-deed, Z could not pre-empt house B alone. Obviously such a plea would be inadmissible, and Z would be held to have a right of pre-emption in respect of house B, on the ground (as I have shown above) that the vendor was under a legal obligation to make an offer of house B to Z before

he sold the same to X, and that the sale to X was an infringement of that right. The same could not be affirmed of the sale of house A, in respect of which Z had no right of pre-emption at all. If that be so, does Z's preferential right of purchase *qua* house B cease to exist simply because instead of X and Y separately purchasing houses A and B, X alone purchases both of them under one sale-deed; in other words, because X is substituted for Y in the bargain of sale? I certainly do not think that such can be the case, for the simple reason that the joint sale of the two houses by the vendor to one person cannot, upon any sound view of the law of pre-emption, be taken to have relieved him of a legal duty cast upon him before the sale of making an offer of house B to Z. Much of the difficulty in connection with the question under consideration arises from the fact that in discussing it attention is paid simply and solely to the position of the *vendee* at the time of the sale and not to that of the *vendor*, with special reference to the relation existing before the sale between the latter and the person entitled to the right of pre-emption. As the vendee claims under the vendor, he is identified with him, and any right which is available against the latter is necessarily enforceable against the former, unless the vendee possesses an independent right of his own existing antecedently to the sale and available against the vendor. That admittedly is not the case here, that is to say, the vendee X had admittedly no right of pre-emption at all in respect of either house A or house B; he, therefore, holds no special status of his own, and must stand or fall with the vendor, irrespectively of the sale to him being either only of one house or of two houses, whether contiguous to each other or not. As against the vendor, Z had the undoubted right to an offer of house B before its actual sale to X, and this right being infringed by the sale in question, he (Z) had a right of redress against the vendor and, therefore, equally against the vendee X; whereas, on the other hand, X having admittedly no right of pre-emption before sale in respect of house B, the sale to him of that house was not by way of recognition of any right which the vendor could set up in answer to Z's claim. In short, it is primarily to the vendor and to the vendor alone that Z must look when he wishes to enforce his right of pre-emption in respect of house B. If, in answer to Z's claim, the vendor (or, as claiming under him, the vendee) can say: "I was under no legal obligation at all, before the sale you com-plain of, to make an offer of the house to you, because either (a) no right to exact such offer vested in you, or (b) if you had

"any right to an offer, a right of a superior or equal degree vested in the vendee X, and the sale to him is in no way an infringement of your right",—if the vendor can say this in answer to Z's claim, then clearly both the vendor and the vendee X are protected. If, on the other hand, he cannot say this, then the sale of house B to X is a manifest violation of Z's right of pre-emption and is voidable at his instance, no matter whether house B alone is sold or house A, which is contiguous to it, is also sold along with it by one and the same deed of sale.

In connection with this aspect of the case, it seems now to be conceded that by reason of the joint sale to him of houses A and B, the vendee X cannot be said to have *acquired a right of pre-emption* in respect of house B, so as thereby to be on a footing of equality with the pre-emptor Z. My brother Rattigan observes that the argument to the contrary imputed by Mr. Justice Chatterji to the vendee's counsel on this point was never advanced, and admits that such a position, if taken up for the vendee, would be clearly untenable. I may be permitted to remark, however, that it seems to me that in some respects the argument for the vendee does amount to an unconscious assumption of that position; and I find that my brother Robertson, influenced, as it appears to me, by counsel's argument to that effect, maintains a substantially identical position when he bases his conclusion adverse to the pre-emptor's claim "mainly on the ground that it cannot be said that at the moment of the purchase the pre-emptor had *any right of pre-emption* over the property claimed *superior to that* of the vendee." If, strictly speaking, this position cannot be maintained, in other words, if the vendee, in this case, cannot properly be said to have a right of pre-emption in respect of house B, what is the precise nature of his defence to the pre-emptor's claim? The reply is that by purchasing house A simultaneously with house B he has acquired, not indeed the right of pre-emption in respect of the latter house, but the *right to resist* the claim to that house advanced by the pre-emptor. But surely the right to resist a claim, if it means anything at all, must exist, and must be founded as a legal right upon something existing, prior to the claim in question actually arising; for I find it difficult to conceive how a right of a definite kind upon the infringement of which a claim to a particular form of redress has arisen against an individual, can, in law, be successfully resisted or neutralized except by setting up a counter-right

of equal force or potency which resided in the person so resisting before the infringement complained of. Obviously the *vendor* himself in this case *had no right to resist* the pre-emptor's claim, for he certainly was, as I have shown, under a legal obligation to make an offer of house B to the latter; and equally obviously the *vendee*, *as claiming under the vendor*, had no such right prior to the sale in dispute. Did he then *acquire the right to resist* the claim of the pre-emptor on his own account by the very sale which was made in violation of the latter's pre-existing right? The sale to the vendee was not made by way of recognition of any pre-existing right possessed by him against the vendor, and the vendor (who admittedly had *no right to resist* the pre-emptor's claim) by making the sale to the vendee conferred upon him for the first time only a right of ownership (a defeasible title) to house B but no right to resist the pre-emptive claim. Possessing no independent right of resistance of his own antecedently to the sale, and no such right having been conferred on him by the vendor (in whom the right did not reside at any time) the vendee cannot, in law, be said to have acquired that right at the moment when the sale was made to him. He would have possessed that right if, prior to the sale in question, he had an equal right of purchase with the pre-emptor, which may be termed, if the expression be permitted, a right of *equi-emption*; and this latter right he would have had if he had purchased house A *before* purchasing house B. Having, however, purchased both the houses at one and the same time, his so-called right of resistance as regards the pre-emptor's pre-existing right of pre-emption in respect of house B was legally a nonentity, and could not come into existence at the moment of the purchase by the mere accident that the pre-emptor had no right of pre-emption in respect of house A.

Muhammad Nawaz Khan v. Mussammat Bobo Sahib (1) which was relied upon by the vendee's counsel in connection with this part of the case, not only does not support the vendee but, on the contrary, lends considerable weight to the pre-emptor's position that in order to be able to resist the latter's claim for pre-emption he (the vendee) should have possessed at the time of the sale to him *a right to purchase house B at least equal to that of the pre-emptor*. In the case cited the defendant-vendee was, at the time of the sale of the house then in dispute, owner of a contiguous house, by virtue of which he

(1) 44 P. B., 1903.

had a right of pre-emption in respect of the house in question, but he had parted with that house before the suit for pre-emption was brought by a neighbour. For the pre-emptor it was argued that as, at the time of the suit the vendee was not owner of a contiguous house, the former had a superior right of pre-emption as compared with the latter in respect of the house in suit. In noticing this argument, the learned Judges say at page 156 :—

“ It is also urged that the defendant having at all events
“ immediately parted with his own house ought not to be allowed
“ to retain the one in suit on the strength of his ownership of
“ that house. But he is defendant, not plaintiff, and the ques-
“ tion of priority must be decided with reference to the circum-
“ stances existing at the time of his purchase and not at any later
“ period, and if he was entitled to purchase at the time of sale he
“ did not forfeit his right by parting with his own house after-
“ wards. * * * * *

“ As the defendant's right to buy was at least equal to that of
“ the plaintiff, we think the claim must fail.”

From the above extract it is clear that, in the opinion of the learned Judges who decided *Muhammad Nawaz Khan v. Musammatt Bobo Sa'ib* (1), the defendant-vendee in that case was able to resist the claim for pre-emption solely on the ground that, before the sale of the house in suit took place in his favour, he had, by reason of being owner of a contiguous house, an equal right of purchase with the pre-emptor, which right having been duly exercised by his purchasing the house in dispute was not affected by the circumstance that, after the purchase but before the suit for pre-emption was brought, he had ceased to be owner of the adjoining house. If the vendee had not been owner of the adjoining house before the sale of the house in dispute, he obviously would not have had a right to purchase the latter equal to that of the pre-emptor; and it necessarily follows that he would not in that case have had the right to resist the pre-emptor's claim. In other words, the vendee's right to resist the pre-emptive claim does not, as it cannot, spring from the sale in dispute at the time that it takes place, but is founded upon his right to purchase the property in suit, which must exist prior to the sale, and must be at least equal to that of the pre-emptor.

Applying that test to the present case, it is clear that the vendee X had not, before the sale in dispute, an equal right of

purchase with the pre-emptor Z in respect of house B ; and that being so, I find it difficult to conceive how by becoming owner of house A simultaneously with house B, he came to occupy a position equal in all respects to that of Z, who had a right of pre-emption as regards house B prior to the sale, or how, by reason of the sale itself, he acquired at the time of the sale the right to resist Z's claim.

I agree with my brother Rattigan that for the purposes of this case the pre-emptor cannot be permitted to assume or presume that the sale of house A was subsequent to the sale of house B, as it is clear that in the face of the terms of the sale-deed such an assumption or presumption is absolutely inadmissible. On the other hand, it is equally clear that the sale of house A cannot be considered as being prior to that of house B, so as to put the vendee on an equal footing with the pre-emptor *qua* the purchase of the house in suit. We must take the facts as they are, and must not deal with them upon the basis of any assumption that may be favourable to one side or the other and which may, in some way, strengthen our opinion.

I also concede that the decisions which lay down that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of the sale in dispute and the institution of the pre-emption suit, are relevant to the present discussion. But those decisions, as I have ventured to hold in the Full Bench reference in *Dhanna Singh v. Gurbakhsh Singh and others*—C. A. No. 98 of 1908—are, in my opinion, erroneous, and no aid can therefore be derived from them in this case. It seems to me, with all deference, that it is a wrong application of the law of pre-emption to hold that the pre-emptor is bound to show that he had a preferential right of purchase as against the vendee not only at the date of the sale of the property in dispute but also at the time of the institution of his suit. The question of priority as between the pre-emptor and the vendee must be decided in advertence to the state of things existing at the time of the sale and not at any later period, and also with special reference to the rights possessed by the pre-emptor and the vendee respectively against the vendor and to the vendor's obligation to offer the property in dispute to one of them in preference to the other before a sale actually takes place.

The pre-emptor in this case does not so much appeal, as my learned brother thinks, to the argument *ab inconvenienti* in

support of his right as he points out the *reductio ad absurdum* which would inevitably be reached if the vendee's argument were pushed to its logical conclusions. One anomalous result of that argument is clear. Through no fault of his own the pre-emptor is, according to the vendee's contention, fixed upon the horns of a dilemma ; he cannot pre-empt both the houses A and B, because his right extends only to house B ; and he cannot pre-empt house B, because the vendee having purchased house A, and become owner of it simultaneously with house B, occupies at the time of the sale a position of equality with the pre-emptor *qua* the latter house. The extraordinary consequence of this argument, which only the subtle mind of a lawyer can contemplate with equanimity, will be, that whenever in a town more houses than one are sold to one person under one sale-deed, in ninety-nine cases out of a hundred there will be no right of pre-emption on the ground of vicinage in respect of any of those houses. I can scarcely believe that this could be the state of the law on the subject, and I am glad to know that the majority of my learned colleagues think that the law is not what the vendee's counsel represents it to be.

As for the sanctity and freedom of the contract of sale, I am as much a respecter of it as any other Judge, but those of us who are trained in the English notions of Contract law will do well to remember that those notions cannot be imported into the system of customary rules that prevail in this Province without seriously jeopardizing long-established and well-recognised institutions of vital importance. Pre-emption is one of these institutions ; and as it has its roots in the early stages of the development of property in land and is intimately associated with social sentiments which still retain something of their original vigour, it must, at least so long as it continues to bear the *imprimatur* of legislative sanction, be scrupulously respected by our Courts of law.

I have given my most anxious consideration to the question referred to the Full Court, and have tried as best I could to look at it from the point of view of my brother Rattigan, but I find it impossible to accept the opinion which he has supported with so much learning, and I greatly regret that I am constrained to differ from him. And in so differing from him I have felt called upon, out of profound respect for his views, to state my reasons in some detail, and this constitutes my principal excuse for writing this rather lengthy judgment.

Agreeing with the learned Chief Judge, I would answer this reference in the negative.

Full Bench.

No. 91.

*Before Sir William Clark, Kt., Chief Judge, Mr. Justice Reid
Mr. Justice Robertson, Mr. Justice Kensington, Mr.
Justice Rattigan, and Mr. Justice Shah Din.*

DHANNA SINGH,—(DEFENDANT),—APPELLANT,

Versus

GURBAKHSI SINGH, &C.,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 98 of 1908.

Pre-emption—Vendee cannot defeat pre-emptor's claim by acquiring a status equal to plaintiff's after the institution of the suit.

Held by the Full Bench (Rattigan, J., dissenting) that in a suit for pre-emption based on the ground, that at the date of sale the pre-emptor was a proprietor in the village in which the property sold is situate, and the vendee was not, the vendee cannot defeat plaintiff's claim by becoming a proprietor in the village, whether by gift or otherwise, after the date of the institution of the suit but before the passing of the pre-emption decree.

*Further appeal from the decree of W. A. LeRossignal, Esquire,
Divisional Judge, Amritsar Division, dated the 17th
December 1907.*

Lal Chand and Sukh Dial, for appellant.

Gurcharan Singh, for respondents.

The order of the Division Bench referring the question of law to a Full Bench:—

SHAH DIN, J.—This appeal arises out of a suit for pre-emption brought by the plaintiff in respect of certain land in Mauza Harpur which was sold by defendants 2 and 3 in favour of defendant No. 1 on the 22nd June 1904. By way of defence to the plaintiffs' claim the vendee pleaded that he was a proprietor in the village at the date of sale and that, therefore, he had equal rights of pre-emption with the plaintiff in respect of the sale in question. The aforesaid plea was based upon an alleged gift of land in Mauza Harpur in favour of the vendee by his father Hazara Singh some time in May 1902. The first Court framed an issue on this point, and, after recording the evidence produced by the parties, found that an oral gift of 34 kanals 2 marlas of land had been made by the vendee's father in his favour, not in May 1902, as alleged, but on the 1st October 1905, mutation having been sanctioned in respect of the land gifted on the 24th

16th Nov. 1908.

November 1905. Holding, therefore, that the vendee was not a proprietor in the village at the date of the sale, the first Court decreed the plaintiffs' claim.

On appeal to the Divisional Judge, the plea of the vendee being a proprietor in the village before 1904 on the basis of the alleged gift in 1902 was again repeated but was overruled. The next point raised (which does not appear to have been specifically taken in the grounds of appeal) was that the vendee became a proprietor in the village at any rate on the 1st October 1905 by virtue of the gift of 34 *kanals* 2 *marlas* of land made in his favour by Hazara Singh, and that inasmuch as by that date the plaintiff had not by obtaining a decree enforced his right of pre-emption in respect of the sale in dispute, his suit could not succeed against the vendee whose *status* as a proprietor in the village was then, so far as a pre-emptive right was concerned, equal to that of the plaintiff. The Divisional Judge did not accept this contention as sound, and after a certain modification of the decree as to the price payable by the plaintiff, dismissed the appeal.

Upon further appeal to this Court, the case came on for hearing before Mr. Justice Rattigan in chambers when the points raised in the Lower Appellate Court were again urged by Rai Sukh Dial for the appellant vendee. The learned Judge agreed with the Courts below in overruling as untenable the plea of the alleged gift of 1902, and found that the vendee was not a proprietor in the village at the date of sale or of the institution of the suit. Holding, however, that the vendee became a proprietor by virtue of the gift of 1905, *i.e.*, after the institution of the suit but before the plaintiff obtained his decree for pre-emption, he felt disposed to accept the appellant's contention that the vendee by thus acquiring land in the village placed himself, as regards rights of pre-emption, upon an equal footing with the plaintiff pre-emptor so as to be able to defeat the plaintiffs' suit. There being, however, no direct authority on the point, the learned Judge thought it desirable to refer the question to a Division Bench for determination. Before proceeding to discuss the question at issue, we may note that the appeal before us is really a Division Bench case, as is admitted by counsel on both sides, and that it was by an oversight that it was laid before a single Judge for decision. We have, therefore, to deal with the whole case and not merely with the one question referred by the learned Judge in chambers.

Mr. Lal Chand, who appeared for the appellant, contended:—

(1) that the Courts below have erred in holding that the alleged gift in favour of the appellant by his father in 1902 is not proved, and that, therefore, he was not a proprietor in the village at the date of the sale; and

(2) that in any case the gift of the 1st October 1905, having been held to be proved, the appellant became a proprietor in the village before the plaintiff enforced his right of pre-emption and completed his title by obtaining a decree and thereby placed himself on a footing of equality with the plaintiff so far as the question of pre-emption was concerned.

As regards the first contention, we are clearly of opinion that the bare statement of Hazara Singh, father of the vendee, in support of the alleged gift of 1902 can carry no weight in this case, nor do we attach any importance in this connection to the most inconclusive entry in the *Tahsil dak bahi* to which our attention was called by Mr. Lal Chand. We have no hesitation, therefore, in holding, in agreement with the courts below, that the gift of 1902 is not established.

The *factum* of the gift of 1905 is clearly proved by mutation proceedings on the record and is not disputed by the plaintiffs' counsel. In connection with the second contention, therefore, it must be held that the defendant vendee became a proprietor in the village after the institution of the suit but before the decree for pre-emption was passed in plaintiffs' favour; and the question which arises for consideration is whether under those circumstances the vendee can in law be held to occupy a position of equality with the plaintiff as regards his right of pre-emption *qua* the sale in dispute, so as to be able to defeat the plaintiffs' suit. Mr. Lal Chand contended that this question must be answered in the affirmative, and in support of that contention he relied upon the following authorities:—

Mughal v. Julal ⁽¹⁾, *Khan v. Mahanda* ⁽²⁾, *Partab Singh v. Fatta* ⁽³⁾, *Darehan Khan v. Sohaura Mal* ⁽⁴⁾, *Ram Gopal v. Piari Lal* ⁽⁵⁾, *Bhagwan Das v. Mohan Lal* ⁽⁶⁾, *Ram Hit Singh v. Narain Raj* ⁽⁷⁾. He also referred by way of analogy to the decisions in *Balkishan v. Kishan Lal* ⁽⁸⁾ and *Rustamji v. Seth Purshotam Das* ⁽⁹⁾ as laying down that under certain circum-

⁽¹⁾ 69 P. R., 1898.

⁽²⁾ 32 P. R., 1902.

⁽³⁾ 45 P. R., 1906.

⁽⁴⁾ 124 P. R., 1907.

⁽⁵⁾ I. L. R., XXI All., 441.

⁽⁶⁾ I. L. R., XXV All., 421.

⁽⁷⁾ I. L. R., XXVI All., 389.

⁽⁸⁾ I. L. R., XI All., 148.

⁽⁹⁾ I. L. R., XXV Bom., 606.

stances events which transpire subsequent to the institution of the suit may affect the rights of the plaintiff as based on the original cause of action.

Now, in *Mughal v. Jalal* ⁽¹⁾ all that was held was that where a share in a joint holding had been sold to three persons of whom two were co-sharers in the holding but the third was not, and the latter before the institution of a suit for pre-emption sold his share to another co-sharer in the same holding, the plaintiff who was also a co-sharer in the land could not succeed as against the three co-sharers who were vendees at the date of suit, and whose rights were in no way inferior to those of the plaintiff pre-emptor. The view which the learned Judges took in that case was that the co-sharer to whom the stranger vendee had transferred his share after the sale but before the date of the suit, must be held to have acquired the said share by coming forward and asserting his superior right of pre-emption (page 236, last paragraph). That decision is, therefore, clearly distinguishable from the present case on more grounds than one and cannot help the appellant.

In *Khan v. Mahanda* ⁽²⁾ it was ruled that the pre-emptive right of a co-sharer of land in joint holding does not subsist after partition at the application of the vendee. There the position of the plaintiff pre-emptor was changed for the worse before the date of suit, with the result that he was before he sued to enforce his right, placed on a footing of equality with the vendee as regards rights of pre-emption. The latter had, however, in no way improved his position, by acquiring a higher *status* after the date of sale and before suit, so as to enjoy equal advantages of pre-emptive right with the plaintiff at the date when the sale was made.

Ram Gopal v. Piari Lal ⁽³⁾ carries the principle enunciated in *Khan v. Mahanda* ⁽²⁾ a step further, as there the partition of the joint holding in which the plaintiff was a co-sharer at the time of sale took place, not before, but after the institution of the suit. But the main feature common to both the decisions is the one adverted to above, *viz*, that in both cases it was the pre-emptor's position which was changed for the worse, thus disentitling him to enforce his pre-emptive right on the ground alleged in the plaint and not the vendee's position that had improved irrespective of the pre-emptor's altered *status*, so as

(1) 69 P. R., 1898. (2) 32 P. R., 1902.

(3) I. L. R., XXI All., 441.

to provide him with a ground of defence to the pre-emption suit which he did not possess at the time of sale. The rule of law laid down in the first paragraph at page 445 of the report of the Allahabad decision, on which Mr. Lal Chand laid great stress in support of his position, is, in our opinion, expressed in too wide language and if pushed to its logical conclusions would lead to grotesque consequences.

In *Bhagwan Das v. Mohan Lal* ⁽¹⁾ the principle laid down in *Amir-ullah Shah v. Tabe Hussein* ⁽²⁾, *Mahlab-ud-Din v. Karam Ilahi* ⁽³⁾, *Serh Mal v. Hukam Singh* ⁽⁴⁾, viz., that a re-sale by the vendee to a third person with rights of pre-emption equal to those of the plaintiff pre-emptor before the date of the pre-emption suit defeats the pre-emptor's claim, was extended to a case where the vendee himself acquires equal rights by virtue of another purchase between the date of the sale in dispute and that of the suit for pre-emption.

In *Ram Hit Singh v. Narain Rai* ⁽⁵⁾ it was held that where after an alleged cause of action for pre-emption had arisen, but before the suit was brought, the vendees acquired, by the dismissal of another suit for pre-emption brought against them by two of the plaintiffs on a different cause of action, a title as co-sharers in the village in which the property sought to be pre-empted was situate, the title so acquired was a good answer to the subsequent suit for pre-emption.

In *Darehan Khan v. Sohaura Mal* ⁽⁶⁾, which is a single Bench decision, it was held that a person, who was at the date of sale a co-sharer in certain land, cannot claim pre-emption in respect of a sale of a share of that land as against a vendee, who at the date aforesaid was not a co-sharer but who became such co-sharer before the suit for pre-emption was instituted.

The three last mentioned decisions were claimed by Mr. Lal Chand as strongly supporting his position, in so far as they lay down that in the case of a sale subject to a right of pre-emption, the vendee may by improving his *status* after the date of sale but before the institution of suit, defeat the pre-emptor's claim. It was urged that the above principle was also fully applicable to a case where the vendee acquires a higher *status* as regards rights of pre-emption *after* the institution of the suit, and that there was no reason in principle why such a vendee should not be able to defeat the pre-emptor's suit by improving

(1) *I. L. R.*, XXV All., 421.

(2) 138 P. R., 1884.

(3) 73 P. R., 1898.

(4) *I. L. R.*, XX All., 100.

(5) *I. L. R.*, XXVI All., 389.

(6) 124 P. R., 1907.

his position at any time before the decree of the first Court was passed in favour of the plaintiff and complied with by him. We cannot help thinking that if the principle contended for were accepted as sound, it would inevitably lead to most undesirable consequences by opening the door to all kinds of fraudulent devices, and would, when pushed to its logical conclusions, practically nullify the law of pre-emption as regards agricultural land. With all respect for the learned Judge who decided *Darehan Khan v. Sahaura Mal* (1) we entertain grave doubts as to the correctness of the principle enunciated by him, and we are equally unable to accept the soundness of the two Allahabad decisions *Bhagwan Das v. Mohan Lal* (2) and *Ram Hit Singh v. Narain Rai* (3) which appear to support that principle. The last cited authority professes to be based on the judgments in *Janki Prasad v. Ishar Das* (4) and *Ram Gopal v. Piar Lal* (5), which, when properly examined, do not warrant the application of the wider principle sought to be deduced from them. Once the extension contended for is conceded, it is somewhat difficult to see where the line can be drawn, or how the non-proprietor vendee can be prevented, in a case like the present, from defeating the pre-emptor's suit by becoming a proprietor in the village at any time before the decree of the final Court of Appeal (see *Bhagwan Das v. Mohan Lal* (6) at pages 428, 429); the rule of law laid down in *Partab Singh v. Fatta* (7), is not disputed, but we fail to see how it helps the appellant in this case.

Mr. Lal Chand admitted that the question before us was not directly covered by authority but he requested (and Mr. Gurcharn Singh for the respondent joined with him in the request) that in view of the importance of the point raised and its bearing on pre-emption suits in general, it be referred to a Full Bench for decision. In this connection it was brought to our notice that a reference to a Full Bench arising out of Further Appeal No. 827 of 1907, *Sanwal Das v. Gur Parshad* (8), in which an analogous question is involved, is pending in this Court, and having since read the judgment delivered in that case we find that, though the question referred there is different from the one before us, one of the learned Judges, Mr. Justice Chatterjee,

(1) 124 P. R., 1907.

(2) I. L. R., XXV All., 421.

(3) I. L. R., XXVI All., 389.

(4) I. L. R., XXI All., 374.

(5) I. L. R., XXI All., 441.

(6) I. L. R., XXV All., 421.

(7) 45 P. R., 1906.

(8) 90 P. R., 1909.

has already expressed views perfectly in accord with those which we are disposed to hold in this case. As the argument of counsel in the above-mentioned reference is likely to travel over the ground partly covered by the present appeal, we think it desirable to refer the question involved in it to the same Full Bench that will dispose of that reference.

The question referred may be stated as follows :—

In a suit for pre-emption, based on the ground that at the date of sale the plaintiff pre-emptor was a proprietor in the village in which the property sold is situate and the vendee was not, can the vendee by becoming a proprietor in that village, whether by gift or otherwise, *after* the date of the institution of the suit but *before* the passing of the pre-emption decree, defeat the plaintiff's claim ?

Upon the reference the following opinions were recorded by the learned Judges, constituting the Full Bench :—

CLARK, C. J.—My judgment in Full Bench case No. 827 of 22nd Dec. 1908. 1907, *Sanwal Das v. Gur Parshad* (1), decides to a great extent the point referred on this appeal which is—

“In a suit for pre-emption, based on the ground that at the date of sale the plaintiff pre-emptor was a proprietor in the village in which the property sold is situate and the vendee was not, can the vendee by becoming a proprietor in that village, whether by gift or otherwise, *after* the date of the institution of the suit but *before* the passing of the pre-emption decree, defeat the plaintiffs' claim ?”

In that judgment I held that a vendee could not by a contemporaneous purchase defeat the rights of a pre-emptor, and it follows *a fortiori* that he cannot defeat them by a subsequent purchase whether prior or subsequent to the institution of the suit, a point which I also discussed in that judgment. It is argued for the vendee that a long course of decision has established that it is not sufficient to look to the plaintiff pre-emptor's cause of action as it existed at the time of sale, but that his superior right of pre-emption at the time of decree must also be made out and that it follows from this that his right at the time of decree must invariably be superior to the vendee's. It may be conceded that where the plaintiff at time of decree no longer possesses a right of pre-emption, he has lost his right of pre-emption and also in the case where the vendee has transferred his rights to a person against whom plaintiff has no right of pre-emption. So far as the original cause of action

(1) 90 P. R., 1909.

has been disregarded, but it is a long step from this concession, to infer that the only question is the comparative rights of the pre-emptor and the vendee at the time of the decree.

The principle on which the decision above referred to is based is, that it would defeat the object of the law of pre-emption if a pre-emptor were allowed to pre-empt when he at the time of the decree no longer possessed the qualifications which entitled him to pre-empt. But this principle does not at all apply to the case of a vendee who only acquires his pre-emption right after the sale that is challenged.

On the contrary it would defeat the whole object of the law of pre-emption if a vendee were allowed to buy and then when a pre-emptor came forward set about to acquire the qualifications necessary to give him a right of pre-emption. Such conduct is moreover opposed to the ordinary principle of justices.

I would answer the question referred in the negative.

23rd Dec. 1908.

REID, J.—I concur in the judgment of the learned Chief Judge, and for reasons recorded in my judgment in Civil Appeal 827 of 1907, *Samwal Das v. Gur Parshad* (1), I concur with the learned Chief Judge in answering the question referred in the negative.

The principle contended for by the learned advocate for the appellant would, if established, lead to the evils pointed out by my brother Chatterji, and I am unable to hold that, because the pre-emptor's position may deteriorate, the purchaser's position may improve after the purchase without any independent deterioration of the pre-emptor's position.

11th Jan. 1909.

RATTIGAN, J.—The question raised in this reference is as follows :—

“ In a suit for pre-emption, based on the ground that a
“ the date of sale the plaintiff pre-emptor was a proprietor in
“ the village in which the property sold is situate, and the
“ vendee was not, can the vendee by becoming a proprietor in
“ that village, whether by gift or otherwise, after the date of
“ the institution of the suit but before the passing of the pre-
“ emption decree, defeat the plaintiff's claim ? ”

The learned Judges who referred this question to the Full Bench have in their order cited all the authorities bearing on the point, and I need say no more as to this than that there is in point of fact only one decision directly relevant and that is

(1) 90 P. R., 1909.

the ruling of the Allahabad High Court reported as *Bhagwan Das v. Mohan Lal* (1). That ruling has up to date not been dissented from and it is to some extent supported by the decisions in *Ram Hit Singh v. Narain Rai* (2) and *Darehan Khan v. Sohaura Mal* (3). So far, then, as actual authorities go, the above question ought to be answered in the affirmative. It is, however, contended that the ruling in *Bhagwan Das v. Mohan Lal* (1) is erroneous, and as we are sitting as a Full Court we are, of course, bound to consider the question independently, though naturally prior decisions on the point involved, whether of this or of any other Court, cannot be ignored.

I regret to find that the learned Chief Judge and my brother Reid held opinions from which I am reluctantly and with diffidence compelled to differ. In my humble opinion, it is essential for a claimant for pre-emption to show that he possesses the right, to which he lays claim, up to the date of decree, and I can find nothing in the judgments of the Chief Judge and my brother Reid or in the referring order in this case to shake my views.

I think that the following propositions are well established and cannot be controverted :—

(1) that the right of pre-emption is a right of a most exceptional and burdensome nature, and that as it infringes upon the owner's ordinary rights of dealing with his property, it should not be decreed unless and until the claimant has conclusively established his right thereto ;

(2) that this so-called right is not a right in property (*jus in re aliena*), but merely a right to acquire property in certain defined circumstances (*jus ad rem acquirendam*) *Lhani Nath v. Budhu* (4), *Muhammad Ayub Khan v. Kure Khan* (5), *Lashkuri Mal v. Isher Singh* (6) ;

(3) that the claimant for pre-emption has no right, title or interest in the property sought to be pre-empted until he pays the amount which the Court decrees to be payable by him for its purchase (see the cases above cited).

(4) that at any time prior to decree, the claimant for pre-emption may lose his so-called right of pre-emption either be-

(1) *I. L. R.*, XXV All. 121.,

(2) *I. L. R.*, XXVI All. 389.

(3) 124 P. R., 1907.

(4) 136 P. R., 1894.

(5) 95 P. R., 1901.

(6) 94 P. R., 1902.

cause he has himself parted with the property by reason of the possession of which he claimed that right, or because the original vendee has transferred the property claimed to a person who has rights of pre-emption in respect thereof either equal or superior to those of the claimant, *Atma Ram v. Devi Dyal* ⁽¹⁾, *Muhammad Ayub Khan v. Rure Khan* ⁽²⁾, *Khan v. Mahanda* ⁽³⁾. This point is conceded by the learned Chief Judge in his judgment in the present case, and I need not dilate upon it further, except to observe that in respect of such transfers by the vendee, the ordinary rule of *lis pendens* is apparently not applicable, *Mahmud Khan v. Khuda Baksh* ⁽⁴⁾ ;

(5) that the right of pre-emption is in reality a right which the claimant has to substitute himself for the original vendee ; and, lastly and

(6) that the right of pre-emption is a right to acquire property *in preference* to another person (section 4 of the Punjab Pre-emption Act, 1905).

From the above summary it is clear that a pre-emptor who has an undoubted cause of action at the time of the institution of the suit can lose his right to a decree, even after the institution of the suit, if (a) he himself parts with the property by reason of which he claimed pre-emption, or (b) the vendee transfers the property sought to be pre-empted to a person against whom the plaintiff has no right of pre-emption. The principle enunciated in the authorities which establish these propositions is, I take it, founded on the broad ground that a right of pre-emption is a right of preferential purchase, and that the object of the law in recognising this right is to retain property in the hands of persons who are more or less intimately connected with it and who very naturally desire to keep out strangers. So long, therefore, as a plaintiff who claims pre-emption can assert that he has a more intimate connection with the property than the vendee, the law gives him the exceptional privilege of compelling the latter to transfer the property to him. But surely in order to obtain this privilege he must be in a position to satisfy the Court, at the time when it is proceeding to pass its decree, that he does actually stand in this singularly privileged position with regard to the property, and if it be once admitted (as it

(1) 49 P. R., 1901,
(2) 95 P. R., 1901,

(3) 32 P. R., 1902.
(4) 26 P. R., 1908.

is) that his right to a decree fails if he has lost that position at any time prior to the date of decree owing to his own property having been transferred by him or to the property in suit having been transferred to one who has rights equal to his own, the logical inference would certainly seem to be that he no less effectually loses his right if, at any time prior to the passing of the decree, the vendee can on any other ground satisfy the Court that the plaintiff's position and rights are in no whit superior to his own, and that *qua* the property claimed he is no more a stranger than the plaintiff. The learned Chief Judge concedes that "it would defeat the object of the law of pre-emption if a pre-emptor were allowed to pre-empt when he at the time of decree no longer possessed the qualifications which entitled him to pre-empt." I entirely agree, and I would ask how can the pre-emptor be said to possess the qualifications which entitle him to pre-empt if, prior to the passing of decree, the vendee has been able to clothe himself with rights which put him on an equality with the pre-emptor? Can the Court in such a case assert, when passing its decree, that the pre-emptor has a *preferential* right to the property? Obviously and admittedly he has not, and I can conceive of many cases in which it would be most inequitable that a pre-emptor should, in such circumstances, be granted a decree. For example:—A sells his share in joint property to B, the son of X who is a co-sharer with A, B is not related to A and has no property of his own in the village. Z, an occupancy tenant of the holding, sues for pre-emption, and after the institution of the suit but before decree, X dies, leaving all his property to B, the vendee. B thus becomes a co-sharer in the holding and had the sale to him occurred prior to X's death, the claim of Z would obviously have been absurd. But according to the learned Chief Judge, the Court would, in such a case, be bound to grant Z a decree for pre-emption and this, too, despite the fact that at the date of the decree B was by inheritance a co-sharer in the holding. A rule of law which would result in such gross injustice does not commend itself to me, nor can I, in view of the possibility of such cases, agree that "it would defeat the whole object of the law of pre-emption if a vendee were allowed to buy and then, when a pre-emptor came forward, set about to acquire the qualification necessary to give him a right of pre-emption." It is not denied that a vendee can, if he so pleases, effectually defy a pre-emptor by acquiring the qualifications necessary to give him a right of pre-emption.

provided he acquires these qualifications before he purchases the property in dispute. The only result, then, of upholding the learned Chief Judge's opinion will be to make it necessary for the vendee to acquire those qualifications before, instead of after, the sale. In practice will this make any difference? It may be said that the vendee cannot in all cases succeed in acquiring those qualifications, but presumably if he can acquire them *after* the sale he can acquire them just as easily *before* the sale. To my mind, therefore, it is idle to found any argument in such cases upon *public policy*, for if the right of the pre-emptor can be frustrated in the manner indicated, it is futile to argue that the vendee should not be allowed to frustrate his rights by action subsequent to the sale.

Despite the differences which in some respects exist between the law of pre-emption as it obtains in the United Provinces and in the Punjab, it will, I think, be conceded that the observations of that very learned Judge, Mahmud, J., upon the general nature of the right and the reasons for its recognition are as applicable to this Province as to the neighbouring Province. I may, therefore, be permitted to refer to those observations and to point out upon the authority of that learned Judge that the very object and *basis* of that right is to prevent the introduction of strangers as co-sharers in the property, and that in its very conception and nature, it is "a transient right," *Rijjo v. Ialman* (1). These observations were quoted with approval by the learned Chief Judge in the judgment which he, as one of the members of the Full Bench, delivered in the case reported as *Faqir Ali Shah v. Ram Kishen* (2).

Accepting this description of the right, I must confess that I fail to see, how the object of the law is set at naught if this "transient right" of the claimant for pre-emption is defeated by the vendee, at any time prior to decree, being able to satisfy the Court that he is not "a stranger," but, on the contrary, a person who stands in just as strong a position as the plaintiff. Of course, if it could be held that events subsequent to the institution of the suit were not to be considered by the Court and that the claimant for pre-emption was entitled under any circumstances to succeed upon the state of facts as they subsisted at the date when he presented his plaint, I frankly admit that my present contention would necessarily

(1) *I. L. R.*, V All., 180.(2) 133 *P. R.*, 120 *F. B.*

fail. But no one goes to this extreme, and it is admitted that in certain circumstances a plaintiff whose claim at the date of suit cannot be contested, may lose his right prior to the date of decree. In other words, it is not denied that plaintiff's cause of action is in certain contingencies liable to be defeated *pendente lite*, and the only point of difference between some of my brethren and myself is as to the nature and character of those circumstances. It may be politic to restrict those circumstances in the manner and to the extent indicated by the learned Chief Judge, but I trust I may be pardoned if I venture with every respect to deny the logic of that restriction. The crucial point in my opinion is for the Court before it passes its decree to see whether the defendant (who may be the vendee or a transferee from the vendee) is, *qua* the plaintiff, a stranger whose "introduction," whether into a village or a house, is opposed to the policy of the law. I fear I am guilty of considerable repetition in emphasising this aspect of the question, but my excuse must be that I regard it as the essence of the point before us. To my mind, what the Court has to look to before it gives one man the right to deprive another of the just results of his contract, is whether the former is at the time of its decision in a better legal position *qua* the property claimed than the person to whom that property has been legally transferred. I say "legally transferred," for I know of no authority which forbids an owner of property from transferring it to A instead of to B, though in many cases B may be entitled, as a very peculiar privilege, to compel A to allow him to substitute himself as vendee of the property in place of A. Upon principle, therefore, I would answer the present reference in the affirmative, but I am further fortified in my opinion by the decisions of the High Court of Allahabad in *Bhagwan Das v. Mohan Lal* ⁽¹⁾ and *Ram Hit Singh v. Narain Rai* ⁽²⁾.

ROBERTSON, J.—I find it very much more difficult to come to a decision in this case than in the case which I have just dealt with, Civil Appeal 827 of 1907, *Sanwal Das v. Gur Parshad* ⁽³⁾.

15th Jan. 1909,

But it appears to me that when once we have granted that a plaintiff in a pre-emption suit can lose his right by the deterioration of his own right, we are committed to the view that he can also lose it by the appreciation of the defendant's right. It appears to me that in any suit for pre-emption what the plaintiff has to prove is that at the time he seeks

⁽¹⁾ I. L. R., XXV All., 421.

⁽²⁾ I. L. R., XXVI All., 389.

⁽³⁾ 90 P. R., 1909.

relief he is entitled to it, *i.e.*, that when the suit is filed he had a right superior to the rights of the original purchaser to purchase the property in question.

The right of pre-emption is simply the right to have one substituted for another purchaser in respect of the property claimed, and the plaintiff must, in my humble judgment, at the time of the suit, be able to show that by reason of his relation to the vendor, the property and the defendant, he has a right within the terms of the Act which is superior to any right the defendant may possess under the Act at that time.

Admittedly he may lose his right by a change in his own position. No doubt the judgments are in cases in which the plaintiff has lost all rights of pre-emption, but cases are possible in which the plaintiff at the time of sale might possess a superior right and still at time of suit possess, not that right but an inferior right.

Thus land is sold in *patti A*. Plaintiff is an owner in *patti A*, he is also an occupancy tenant in *patti B*.

The purchaser is not an owner in *patti A*, but is an occupancy tenant of the land in suit.

Thus at the time of sale plaintiff comes under section 12 (c) *secondly* and *fifthly*.

Defendant comes under section 12 (c) *fourthly* and plaintiff has a superior right. Prior to suit he sells his land in *patti A*, but retains his occupancy rights in *patti B*, remaining, therefore, in class section 12 (c) *fifthly* and so having a right to pre-empt against outsiders, but one inferior to defendant who comes under section 12 (c) *fourthly*.

Under the rulings, accepted by the learned Chief Judge, plaintiff must lose his suit. Now let us take the converse case.

The plaintiff is a tenant having a right of occupancy in the land sold. The defendant is a tenant having a right of occupancy in other land. Plaintiff is, therefore, in class section 12 *fourthly*, and defendant is in section 12 *fifthly*, and plaintiff has a superior right. But before suit defendant buys the land of which he is occupancy tenant and so comes into class section 12 *secondly*, the land being in the same *patti* as that in dispute. In this case, is the plaintiff's claim still to be decreed? Also under section 73, if a defendant having an inferior

claim under section 13 *seventhly* buys before suit property to which the suit in question is servient and comes under *sixthly*. What is to happen ?

I think, agreeing generally with the learned discussion of the question by my brother Rattigan, that if we accept the view, as to which I confess some doubt, that a plaintiff can lose his superior rights by depreciation, then a defendant can defeat the claim equally by an appreciation of his rights before the suit is brought. The question is one of much doubt, and I feel the difficulties of either position strongly. But on the accepted rulings and other authorities as they stand, and on my own view of what is consistent and logical, I think that the basis of decision in a pre-emption suit should be the relative strength of rights of pre-emption at the date of suit. I do not think it necessary to go beyond that.

KENSINGTON, J.—I agree with those of my learned colleagues who are in favour of answering the question referred in the negative. The question whether the ruling in *Darehan Khan and others v. Sohaura Mal* (1), is correct, is not directly covered by the reference, but the line of argument therein is the same as that now taken by my learned brother Rattigan. I can only say that it does not commend itself to my judgment. I am in favour of holding that a vendee cannot improve his position, so as to defeat a right of pre-emption against him, by anything which he does subsequently to the date of sale. There are difficulties enough in the law of pre-emption without adding to them by the dangerous doctrines of analogy. We have a perfectly clear position if we look to the date of sale, and to that alone, as determining the rights of the parties, and I should have considerable hesitation in following rulings to the effect that later depreciation of a pre-emptor's rights will bar his suit. That, however, is not the point immediately before us now, and the correctness of those rulings need not be discussed. What does seem to me clear is that we ought, at any rate, to go no further in the direction of adding to the normal uncertainties of the law. If we adopt the argument so strenuously urged by Mr. Justice Rattigan, where are we to draw the line ? Is the vendee to be allowed to go on taking fresh opportunities of improving his position, and thereby defeating the pre-emptor, until the case is finally disposed of in the highest Court of appeal ? I can

8th April 1909.

see no logical ground for saying that his hand is to be stayed at one time more than another, absurd though the result might be, if he is allowed practically unlimited time and opportunity, and I cannot see that the law requires us to interfere at all in his favour. In my humble opinion the only safe rule to lay down is that he is limited to such rights as he holds at the time of sale. I would, therefore, answer the question referred in the negative.

SHAH DIN, J.—I have already expressed with sufficient clearness my opinion on the question referred in the order of reference, and after reading the learned judgment of my brother Rattigan, in which he strenuously maintains the opposite view, I still adhere to that opinion. In his argument before the Full Court, the learned advocate for the appellant has added little to what he urged before the Division Bench; and it is, therefore, necessary only to consider further one or two points which have been dilated upon in my brother Rattigan's dissentient judgment.

Of the six propositions laid down by my learned brother at the commencement of his judgment, I accept without demur all, save and except the first part of the fourth proposition, namely, "that at any time prior to decree the claimant for pre-emption may lose his so-called right of pre-emption, because he has himself parted with the property by reason of the possession of which he claimed that right." This proposition is further on explained as meaning that a pre-emptor, who has an undoubted cause of action at the time of the institution of the suit, can lose his right to a decree, even after the institution of the suit, if he himself parts with the property by reason of which he claimed pre-emption; and this loss of right is said to be founded on the broad ground that the object of the law in recognising a right of pre-emption is to retain property in the hands of persons who are more or less intimately connected with it and who, therefore, desire to keep out strangers. From this it is argued that a plaintiff, who claims the privilege of preferential purchase, must be in a position to satisfy the Court at the time when a decree is proposed to be passed in his favour, that he is more intimately associated with the property in suit than the vendee, and that he must lose that privilege if, at any time before the passing of the decree for pre-emption, the vendee can, on any ground, satisfy the Court that the plaintiff's position and rights are in no

way superior to his own, and that *qua* the property claimed he is no more a stranger than the plaintiff himself. The plaintiff-pre emptor, it is urged, cannot be said to possess the qualifications which entitle him to pre-empt if, prior to the passing of the decree, the vendee has been able to clothe himself with the rights which put him on an equality with the pre-emptor.

Even if, for the sake of argument, the initial proposition laid down by my learned brother in the terms set out above, be accepted as correct, I think, with all possible deference, that the inference which is sought to be deduced therefrom, as indicated above, does not by any means follow as a necessary logical conclusion. It is not, in my humble opinion, correct to say that because a pre-emptor may in certain contingencies, (as for example, by selling the property by virtue of which he claims pre-emption) lose his right of pre-emption after the institution of the suit but before the passing of the pre-emption decree, that, therefore, he must lose that right if the vendee, at any time before the decree, improves his position by becoming owner of *other* property, the ownership of which before the date of sale would have enabled him to enjoy an equal right of purchase with the pre-emptor. There is, it seems to me, a clear distinction between the position of a pre-emptor seeking to enforce his right of pre-emption by virtue of his possessing certain definite advantages because of his special connection with a particular kind of property, the subject of a sale, and that of a vendee of that property who, at the time of the sale, possesses no such advantages. The former, it is said (on grounds which I shall presently examine), must continue down to the date of the decree in his favour to occupy the privileged position with regard to the property in suit by virtue of which he was at the date of sale entitled to claim pre-emption; and it is considered inequitable to permit him to enforce his rights if, prior to decree he loses the advantage of that position by reason of a material change in his connection with the very property, the ownership of which conferred that advantage upon him. The latter, on the other hand, possessed at the date of sale no rights of any kind based upon any ownership of property and obviously started with no valid ground of defence to the pre-emptor's superior claim; and that being so, how can it be said that, though the pre-emptor's position remains absolutely unchanged both as regards his own property, and the property in suit, the vendee, by acquiring before decree

other property of which he was not an owner at the date of sale, improves his position *qua* the property in suit, so as to make the pre-emptor *lose* the right which he undoubtedly possessed at the time of sale and even at the date of the institution of the suit. The pre-emptor's position obviously neither improves nor deteriorates if after the sale he acquires or parts with any property *other* than the property by virtue of which he had a right of pre-emption at the date of sale; it is only if he loses the latter property, that is to say, the property by virtue of which he claims pre-emption, that it has been ruled that his right of pre-emption is lost. Why should a different principle operate in favour of the vendee; in other words, why should the vendee by acquiring after the sale property *other* than what he already owned at the date of sale and also *other* than the property by virtue of which the pre-emptor claims pre-emption, be considered to have improved his position as compared with the position of the pre-emptor, which has remained unchanged, and to have placed himself on a footing of equality with the latter.

Looking at the matter in another way, I fail to understand how the vendee, who at the time of sale had not a right of equal purchase, or (as I have already ventured to term it) a right of pre-emption, with the pre-emptor, can at all place himself on a footing of *equality* with the latter by reason of acquiring any property *after* the date of sale. *Equality with the pre-emptor* means, if it means anything at all, *equality with him as regards the right of purchasing the property in dispute*; and this right exists, and can only exist, at the time when the sale is made and at no later period, and it implies the existence of a corresponding obligation which is imposed by law upon the vendor to offer his property, before actual sale, to a person having a right of pre-emption in respect of it. If, before actual sale, the vendee was not entitled to an offer of the property sold from the vendor, and if the pre-emptor was so entitled, then the vendee had not a right of equal purchase with the pre-emptor, and, therefore, was not, at the time of the sale in question, on a footing of equality with him. If after the sale the vendee acquires *other* property, whether before or after the institution of the suit for pre-emption against him, surely such acquisition cannot relate back to the time when the sale of the property in dispute was made in his favour, and he cannot be rightly considered, by reason of such subsequent acquisition, to have acquired a right of equal purchase with the pre-emptor *qua* the property sold to him by the vendor in violation of the latter's right. Acquisition of property subsequent to the sale in dispute would

doubtless put the vendee on a footing of equality with the pre-emptor as regards sales which would take place *after* such acquisition, but upon no principle underlying the law of pre-emption can it enable the vendee to say that he had thereby succeeded, either in absolving the vendor from the primary obligation of offering the property in suit to the pre-emptor, or in acquiring the right to purchase that property himself at the time when it was purchased by him, which was equal in all respects to that of the pre-emptor.

I may illustrate my meaning by reference to the facts of the case out of which the present reference has arisen. On the 22nd June 1904, when the sale in dispute took place, the plaintiff-pre-emptor was a proprietor in the village, while the defendant-vendee was not a proprietor. On the date aforesaid, therefore, the pre-emptor had a preferential right of purchase in respect of the property in dispute as compared with the vendee, which means that the vendor was under a legal obligation, before he actually sold his land to the vendee, to make an offer of it to the pre-emptor, and that his omission to make such offer and the subsequent sale by him to the vendee was an infringement of the pre-emptor's right of pre-emption. This infringement of his right afforded the pre-emptor a cause of action against both the vendor and the vendee, upon which the present suit for pre-emption was based. At the time of the sale and also at the date of the institution of the suit (*viz.*, the 22nd June 1905), the vendee admittedly had, and could have, no right of equal purchase with the pre-emptor, and, therefore, did not occupy a position of equality with him. When, therefore, on the 1st October 1905 the vendee's father made a gift of certain land in the village in his favour, whereby he became a proprietor in the village, could it be predicated of him (the vendee) that by reason of becoming a proprietor on the 1st October 1905, he was "able to clothe himself with rights which put him on an equality with the pre-emptor"; in other words, to be more precise, could it be said that on the above-mentioned date the vendee acquired a right of equal purchase with the pre-emptor in respect of the property in suit, at the time when the original sale took place, *i.e.*, on the 22nd June 1904? This question can be answered in the affirmative only if it can be maintained that the vendee's alleged right of equality must be referred back to the date of the original sale in his favour which afforded the pre-emptor his cause of action; and I confess, I fail to understand how, upon any principle of substantive law or procedure, the vendee's subsequently acquired *status*

can be so referred back with the result of conferring upon him a right of equi-emption with the pre-emptor as regards the property in suit. The vendee, by reason of the gift in his favour, could, under no circumstances have a *retrospective right of purchase* in respect of any sale of land that took place prior to the date of the gift; though he undoubtedly acquired thereby a right of equal purchase with the present pre-emptor, and with all other proprietors in the village, in regard to sales which might have occurred after the date of the gift or that will take place in future. It is in this limited sense that the gift in question by making him a proprietor in the village put him on an equality with the pre-emptor, but this will help him only in regard to sales which occurred or which will occur after the date of the gift, and has no bearing upon the sale which is the subject-matter of the present litigation. In comparing the rights *inter se*, of the pre-emptor and the vendee in regard to the sale in dispute, the point of time to be regarded is the date when the sale in question took place and not any later date. If on that date their rights of purchase in respect of the property in suit were equal, the pre-emptor's claim must fail; if, on the other hand, their rights at that time were not equal, in other words, if the pre-emptor had then a preferential right of purchase as against the vendee, the former's right must prevail, and no gift of land in favour of the latter and no purchase of land by him subsequent to the date aforesaid, will, in my opinion, serve to "clothe him with rights which will put him on an equality with the pre-emptor."

It is the disregard of this fundamental principle which, in my judgment, is responsible for the confusion of ideas upon which the argument of the vendee's learned advocate in this case proceeds; and the Allahabad decisions which he has cited in support of his position will, upon close examination, be found to be based on a similar misconception of the relative position of the pre-emptor and the vendee in a dispute arising out of the assertion of a right of pre-emption. As I have said above, even if it be conceded that a pre-emptor, whose position deteriorates, for some reason or other, after the date of a disputed sale but before decree, loses his right of pre-emption, it does not by any means follow that the vendee can, irrespectively of any independent deterioration of the pre-emptor's position, improve his own *qua* the property in suit by acquiring other property between the date of the sale in question and the date of the decree in pre-emptor's favour. But it seems to me, with all deference to the

learned Judges of the Allahabad High Court, who have held that opinion, that the first part of the above proposition is hardly justified upon a strictly legal view of the right of pre-emption, at least as known in our own Province.

In *Janki Parsai v. Ishar Das* ⁽¹⁾ it was held that in order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit is brought. It is noteworthy that the view which was here accepted by the Allahabad High Court was urged before them on the basis of the Muhammadan Law, and that it was argued that the principle upon which the rule of Muhammadan Law on the subject was based, was equally applicable to pre-emption suits based on the *Wajib-ul-Arz* (page 375). It is well known that the Muhammadan Law of pre-emption on this point favours the vendee, *Sakina Bibi v. Amira*. ⁽²⁾ and as that law has always been freely administered in pre-emption cases by the High Court in the United Provinces, it enters very largely into the conceptions underlying the case-law in those Provinces by supplying rules of decision by analogy in most instances where no definite statutory provisions can be appealed to.

Under the Punjab Pre-emption Act, a pre-emptor's cause of action arises when a sale is made in violation of his rights (section 18 of the Act), and it appears to me that in all cases in which a cause of action is well founded under the Act, with reference to the state of things which existed at the time of sale, that *cause of action, viewed as a valid ground of claim* cannot be lost or affected by a reason of a new circumstance coming into existence after the sale. In the Allahabad case, for instance, if the pre-emptor had a good cause of action in respect of the sale of the share of land then in dispute by reason of his being a co-sharer in the *thoke* of which the land sold formed part, *that cause of action was complete and accrued to him once for all on the date of the sale and continued to subsist as a cause of action in respect of that sale*, even after the pre-emptor ceased to be a co-sharer in the *thoke* by reason of a partition of it before the suit was filed, which partition could obviously not relate back to the time when the sale in question was made. Once his cause of action is complete, a pre-emptor is entitled to come into

(1) *I. L. R.*, XXI All., 374.

(2) *I. L. R.*, X All., 472.

Court at once ; and I find it difficult to perceive how his *cause of action as such* can be said not to subsist, because he delays to institute his suit, and because meanwhile a circumstance has come into existence which did not exist at the time of, and, therefore, did not affect, the accrual of the original cause of action. It seems to me, therefore, that the learned Chief Justice of the Allahabad High Court misconceived, if I may venture to say so, the true legal import and effect of a cause of action when he laid down in the decision cited above that, in the circumstances stated, the pre-emptor's *cause of action* did not subsist at the date of suit.

In *Ram Gopal v. Piari Lal* ⁽¹⁾ the principle laid down in the above-mentioned case was carried a step further, and it was decided, in disregard, as it seems to me, of the principles which underlie a customary right of pre-emption and which regulate the accrual of a pre-emptor's cause of action, that the pre-emptor, who was a co-sharer with the vendor at the time of the sale of a share of a holding, had lost his right as against a stranger vendee, because before decree the joint holding had become the subject of a perfect partition. In both the Allahabad cases just cited, it was admitted that there existed no judicial precedent on the question before the High Court, and in the absence of authority on the subject an appeal was made to the analogy of the Muhammadan Law and to general principles. General principles, however, so far as they are deducible from the statutory provisions relating to pre-emption in the Punjab, are, in my opinion, much more in favour of the pre-emptor's cause of action, after it has once accrued, not being affected by any contingencies that arise after the date of sale ; for, strictly speaking, it cannot be said, as I have shown above, that by reason of any such contingencies arising, the cause of action in question, which was well founded in the light of the state of things existing at the time of the sale, was subsequently lost or in any way weakened as an original ground of claim.

In *Bhagwan Das v. Mohan Lal* ⁽²⁾ the advocate for the vendee sought in his argument to push the principle laid down in *Ram Gopal v. Piari Lal* ⁽¹⁾ to its logical conclusions, as he contended that the pre-emptor concerned lost his right of pre-emption by reason of the joint holding, in which he and the vendor were co-sharers at the date of sale, having been

⁽¹⁾ I. L. R., XXI All., 441.

⁽²⁾ I. L. R., XXV All., 421.

partitioned after the decree of the First Court, but before the appeal was finally heard in the High Court; and I certainly think that if the principle of the earlier decision was legally correct, the contention advanced by the vendee's advocate was not only plausible but perfectly sound. The learned Judges of the High Court, however, perceiving the anomalous consequences that would flow from an acceptance of that contention, refused to extend any further the principle of their own previous decision, contenting themselves with the remark that "we certainly are not inclined to extend the rule in the way desired by the learned advocate" (pages 428-429). A principle which does not admit of being pushed to its logical conclusions is at best a faulty principle, and though it may outwardly appear to be an attractive one, we should not, unless constrained to do so for some reasons of undeniable weight, accept it as one applicable to valuable rights created or safeguarded by Statute.

While refusing to extend further in the case under consideration a principle accepted as sound by their own Court on two previous occasions, the learned Judges of the Allahabad High Court proceeded in this very case to lay down a new principle not covered by precedent, which in its practical application is calculated to lead to startling results. They held, that if a stranger purchases a share in a village which is subject to a right of pre-emption, but after such purchase and before any suit for pre-emption is brought against him, purchases another share in the same village, he cannot be deprived of the first-mentioned share by a pre-emptor whose right was superior to his at the time when the first sale took place in his favour. In support of this decision the learned Judges relied upon the principle underlying the ruling in *Serh Mal v. Hukam Singh* ⁽¹⁾ which principle is fully recognized by our own Court (see *Amirullah Shah v. Tabe Hussein* ⁽²⁾ and *Mahtab-ud-Din v. Karam Ilahi* ⁽³⁾), but which, with all possible deference, is not applicable to cases of the kind before the Allahabad High Court. That principle is that where, for instance, A, a stranger in the village, purchases land in respect of which both B and C have equal rights of pre-emption, and before a suit for pre-emption is brought in respect of that land by B against A, the latter (A) resells the land to C, the former's (B's) suit must fail against both A and C. The reason

⁽¹⁾ I. L. R., XX All., 100.

⁽²⁾ 138 P. R., 1884,

⁽³⁾ 73 P. R., 1898.

of the rule is that the second vendee C had an *independent right of pre-emption* as against A in respect of the subject of sale, which was equal to that of B *at the time when the sale took place* in favour of A, and that the resale by A to C was made in recognition of C's pre-existing right of pre-emption. Since, therefore, the pre-emptor B could not affirm that at the time of the original sale he had a preferential right of purchase as against C (though he may have had such a right against A), C cannot be made to give way to B's claim, simply because B asserted his right through Court while C did so privately. The competing rights of B and C have to be compared with reference to the state of things existing at the time of the original sale, and according to that test, B has no superior right to that of C, and cannot, therefore, succeed against C. Surely that principle has no application to a case like the one before the Allahabad High Court, where admittedly the vendee had no right of equal purchase with the pre-emptor at the time when the sale in dispute took place, and where the second sale was of property other than that sold on the first occasion and was in favour of the same vendee, who could in no way predicate of himself by reason of this second sale to him that he had a right of purchase in respect of the first sale equal to that of the pre-emptor.

The second purchase by the vendee in that case had, and could have had, no retrospective effect so as to put him on a footing of equality with the pre-emptor in regard to the sale in dispute, which afforded the latter his complete cause of action; and it is, therefore, obvious that the vendee, in spite of the second purchase by him, could not occupy the same position as the rival pre-emptor C occupied in the illustration given above. With all due respect, therefore, to the learned Judges of the Allahabad High Court, I venture to think that the principle laid down for the first time in *Bhagwan Das v. Mohan Lal* ⁽¹⁾ is not a sound application of the *ratio decidendi* of *Serh Mal v. Hukam Singh* ⁽²⁾ and is incongruous with the fundamental conceptions of the customary or statutory right of pre-emption as known in the Punjab.

I may here refer to the ruling of this Court in *Mahmud Khan v. Khuda Buksh* ⁽³⁾ which fully supports the view I have ventured to express above. In that case the principle laid

⁽¹⁾ I. L. R., XXV All., 421.

⁽²⁾ I. L. R., XX All., 100.

⁽³⁾ 26 P. R., 1908.

down in *Amir-ullah Shah v. Tabe Hussein* ⁽¹⁾, *Mahtab-ud-Din v. Karam Ilahi* ⁽²⁾ and *Serh Mal v. Hukam Singh* ⁽³⁾ was accepted and was extended to a resale made by the original vendee, after the institution of a suit by a pre-emptor, to a third person who had an independent right of pre-emption in respect of the original sale equal to that of the first-mentioned pre-emptor, and who also had asserted his right by suit. The Judges observed at page 145: "No doubt, he (the second vendee) gets no further rights as against the respondent by the deed of sale *per se*, but he can maintain that sale, if he can prove a pre-existent right to have it executed in his favour. So far only does the doctrine of *lis pendens* apply that the sale could create no new right in his favour having its birth subsequent to the suit of the respondent, but obviously he is not debarred from asserting any pre-existent right he may have had against the vendor and the vendee by the mere fact that some one else had brought a claim against them in reference to the same property."

In *Ram Hit Singh v. Narain Rai* ⁽⁴⁾ again, a principle similar to the one laid down in *Bhagwan Das v. Mohan Lal* ⁽⁵⁾ is enunciated without any discussion of the fundamental conceptions involved upon the analogy of the rulings in *Janki Prasad v. Ishar Das* ⁽⁶⁾ and *Ram Gopal v. Piari Lal* ⁽⁷⁾ which, as I have ventured to point out above, involve a wholly different principle bearing upon the alteration of the position of a plaintiff-pre-emptor between the date of suit and the date of the decree of the First Court. The decision of this Court in *Darehan Khan v. Sohaura Mal* ⁽⁸⁾ accepts the correctness of the decision in *Ram Hit Singh v. Narain Rai* ⁽⁴⁾ and is to that extent in favour of the vendee in the present case. *Muhammad Nawaz Khan v. Mussammatt Bobo Sabih* ⁽⁹⁾ which is relied upon in *Darehan Khan v. Sohaura Mal* ⁽⁸⁾ as being in favour of the vendee in that case, does not, when properly examined, really support his position, as I have endeavoured to explain in my judgment in the Full Bench case of *Sanwal Das v. Gur Parshad* ⁽¹⁰⁾.

The simplest and the soundest principle to apply in cases of disputed pre-emption such as the one before us, is to look to the state of things existing at the time of the sale in

⁽¹⁾ 138 P. R., 1884.

⁽²⁾ 73 P. R., 1898.

⁽³⁾ I. L. R. XX All., 100.

⁽⁴⁾ I. L. R. XXVI All., 389.

⁽⁵⁾ I. L. R. XXV All., 421.

⁽⁶⁾ I. L. R. XXI All., 374.

⁽⁷⁾ I. L. R. XXI All., 441.

⁽⁸⁾ 124 P. R., 1907.

⁽⁹⁾ 44 P. R., 1903.

⁽¹⁰⁾ 90 P. R., 1909.

question and to compare the rights of purchase *qua* the property in suit possessed by the pre-emptor and the vendee (or the transferee from the vendee) at that time. If their rights were equal at the time of sale, the pre-emptor must fail; if not so equal, the pre-emptor should succeed, regardless of the apparently strange consequences that may, in rare instances, flow from the enforcement of this rule. The only way in which, consistently with the above principle, the vendee in the present case can resist the pre-emptor's suit by reason of the gift made by his father in his favour after the institution of that suit, is by showing that in consequence of that gift he acquired the same rights of purchase in respect of the land in dispute as his father had at the date of sale. But this he is precluded from urging as laid down in the Full Bench decision of the Allahabad High Court, *Sheo Narain v. Hira* ⁽¹⁾ and in our own Full Bench case *Faqir Ali Shah v. Ram Kishen* ⁽²⁾, for the simple reason that a voluntary transfer of land by gift from the father to the son does not confer upon the latter the right of pre-emption which the former possessed by reason of his ownership of the subject of gift at the time when the disputed sale took place (see also *Muhammad Ayub Khan v. Rure Khan* ⁽³⁾). And yet, if the vendee's argument were accepted in the present case, the legal effect of it would be precisely the same as if he had been allowed to step into the shoes of his father as regards all rights of pre-emption which vested in the latter at the time of the sale under consideration, and by virtue of which the father, if he himself had been the vendee, would have been able to resist the present suit for pre-emption.

The principle of deciding a case of disputed pre-emption by reference to the relative rights of purchase possessed by the pre-emptor and the vendee at the time of sale, was also accepted and acted upon in the case of *Bhupa v. Kori Mal* printed as a footnote to *Kalu v. Bhupa* ⁽⁴⁾ (page 168) and in *Kehr Singh v. Mahman Singh* ⁽⁵⁾.

With regard to the passage in the judgment of Mahmud, J., in *Rajjo v. Lalman* ⁽⁶⁾ to which my brother Rattigan has referred, and in which that learned Judge speaks of the right of pre-emption being in its very conception and nature "a transient right" I need only here refer to a fuller discussion of the same

⁽¹⁾ *I. L. R. VII All.*, 535.

⁽²⁾ 133 *P. R.*, 1907.

⁽³⁾ 95 *P. R.*, 1901.

⁽⁴⁾ 30 *P. R.*, 1893.

⁽⁵⁾ 25 *P. R.*, 1908.

⁽⁶⁾ *I. L. R. V All.*, 180.

point by the same eminent Judge in the Full Bench case of *Gobind Dayal v. Inayatullah* (1), at page 811, where the use of the word "transitory" in connection with the right of pre-emption is explained.

If the argument of the learned advocate for the vendee in this case with regard to the vendee being entitled to improve his position after the institution of the suit were accepted, it is clear that the line could not be logically drawn at the decree of the First Court, for I fail to see how, consistently with the contention advanced, the vendee could be prevented from conceivably improving his position at any time before the decree of the final Court of appeal. Suppose, for instance, that in a case like the present the pre-emptor's suit were dismissed by the First Court on the ground that he had waived his right of pre-emption, and the dismissal were upheld on the same ground by the Divisional Court, from whose decree an appeal were preferred to this Court; and suppose that just before the appeal came on for hearing here (say five years or more after the date of the original sale) the vendee were to become a proprietor in the village by gift or sale. Would he be permitted to urge in this Court, in the event of this Court holding that there had been no waiver of his right of pre-emption by the pre-emptor and that the suit should not have been dismissed on that ground, that the pre-emptor had lost his right as against the vendee because of the latter having become a land-owner in the village before a decree had been passed in favour of the former? Add to this the delay that may be caused by possible remands by the Divisional Court and by this Court, and the result would be that very many years after the date of the original sale the pre-emptor's suit may be thrown out, after he has incurred considerable expense and undergone great personal inconvenience, on a ground which was never pleaded by the vendee in the First Court, and which the pre-emptor could not possibly anticipate or meet. Such results are too serious to be brushed aside with a light heart, and the whole object of the law of pre-emption would be defeated if we were not to take these anomalous results into consideration. Some inconvenience might possibly result in adopting the uniform rule which I have ventured to discuss above, but instances of such inconvenience will be much

(1) I. L. R. VII All., 775.

rarer than would be the case if the vendee's contention in the present case were to prevail. For the foregoing reasons I would hold that the relative rights of the pre-emptor and the vendee in this case must be considered with reference to the facts existing at the time of sale, and I would answer the question referred to us in the negative.

No. 92.

Before Mr. Justice Johnstone and Mr. Justice Scott-Smith.

FAZAL AHMED AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

SHAHAB DIN AND OTHERS,—(PLAINTIFFS), —AND OTHERS,
—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No 581 of 1908.

Declaratory suit by reversioners—Alienation found to be in part without necessity—Form of decree.

Held, that in declaratory suits by reversioners to have an alienation declared void after the death of the alienor if the Court finds, that the alienation is in part only for necessity, the decree should declare (1) that the alienation shall not take effect at all against the reversioners after the death of the alienor, and (2) that the reversioners shall not be entitled to possession until they have paid the sum found to be for "necessity."

Further appeal from the decree of B. H. Bird, Esquire, Additional Divisional Judge, Amritsar Division, dated the 28th April 1908.

Muhammad Shafi, for appellants.

Jalal-ud-din, for respondents.

The judgment of the Court was delivered by—

15th July 1909.

JOHNSTONE, J.—On 2nd April 1898 Ida mortgaged the land in suit for Rs. 2,000 to Husain Bakhsh and Miran Bakhsh. There were several previous mortgagees. The new mortgagees were to redeem from them and so get possession, and after acquisition of possession interest and profits were to be considered equal. Mortgagor was not to redeem until after 60 years. On 8th June 1898 the reversioners sued for the usual declaration, reciting the ill-feeling that had prompted the alienation, mentioning the term of 60 years, and asking that the alienation should be taken as invalid against them, and adding a prayer for any other just relief. On 31st August 1898 the First Court dismissed the suit on a preliminary point, and then, on remand under section 562, Civil Procedure Code (1882), found

only Rs. 400, binding on the estate in the hands of reversioners, and so gave a decree "that the mortgage made in favour of defendants 2 and 3 shall not be binding on the plaintiffs after *Ida's* death except to the extent of Rs. 400."

On appeal the learned Divisional Judge raised the figure to Rs. 1,666, disallowing Rs. 334 only, and gave a decree to the effect that "Rs. 1,666 is a valid charge on the land which plaintiffs must pay before they can redeem it *after the death of Ida.*" Neither in the first Court's judgment or decree, nor in the judgment or decree of the lower Appellate Court in that declaratory case, is there any argument or discussion upon the question of the term of the mortgage (60 years).

A further appeal was preferred by plaintiffs to the Chief Court, which on 25th July 1908 dismissed that appeal. Cross-objections had been filed by the mortgagees, but these were dropped. In paragraph 5 of these cross-objections mortgagees had stated that the 60 years' term should stand; but the cross-objections were dismissed, and the Chief Court decree was to the effect that the alienation "shall affect plaintiffs' reversionary rights to the extent of Rs. 1,666 only."

When plaintiffs, heirs of *Ida*, brought their present suit for redemption of the land on payment of Rs. 1,666, they were met by the plea that redemption could not take place till the expiry of sixty years from date of mortgage. The first Court found this plea a good one and dismissed the suit as premature; but the learned Divisional Judge took the opposite view, holding that the mortgage was "wholly upset" except as regards the obligation to pay Rs. 1,666.

Mortgagees have appealed again, and we have heard arguments. In our opinion the appeal must fail. It seems to us to rest upon a fundamental misconception.

Primarily we have to interpret the decree of the Chief Court of 25th July 1908, but inasmuch as the judgment of that Court purported to leave the decree of the Divisional Judge intact, and inasmuch as the judgment of the Divisional Judge purported only to alter the decree of the first Court as regards the sum to be deemed a valid burden on the land, we can and should look at all three decrees in order to ascertain what the last one means. We will discuss presently the real meaning in law of decrees like these, apart from their exact wording, and take up now these three decrees exactly as they stand.

In the Chief Court decree, it is said that the alienation shall affect plaintiffs' reversionary rights to the extent of Rs. 1,666 only. The literal meaning of this is that after the death of Ida Rs. 1,666 will be a burden on the land, and that apart from this nothing in the mortgage deed will remain in force.

The Divisional Judge's decree is still plainer. When the Divisional Judge wrote that plaintiffs must pay Rs. 1,666 before they can redeem the land "after the death of Ida," he can hardly have contemplated that redemption could not be made until 60 years had passed, for there was no possibility of a man of Ida's age living another 50 or 60 years; and the pointed reference to payment "after the death of Ida" shews that he must have contemplated simply power of "redemption" immediately after Ida should die.

It is unnecessary to discuss exactly what the First Court's decree meant, as the matter is now clear.

A few remarks upon the true meaning of the interference of the Courts in these cases will make it still more abundantly clear that in the present case the 60 years' condition cannot stand and could not have been meant to stand. When a sonless male proprietor,* subject to Punjab Customary Law, sells a piece of ancestral land and upon a suit by a reversioner for a declaration that the sale, not being for consideration and "necessity," does not affect his reversionary interests, the Court finds that only a portion of the consideration passed for a necessary purpose, that Court does not, and cannot, "convert the sale into a mortgage," though the language used in judgments and decrees would sometimes seem to imply that this was so. We are aware of no law under which a Court having, so far as concerns the plaintiffs' rights, cancelled a sale, can create a mortgage for the sum of money found to be for "necessity." What it does, is to find the sale invalid as against plaintiff and then to rule that, inasmuch as he who seeks equity must do equity, plaintiff, who has benefited by the liquidation of debts that would have been binding on the estate in his hands, must, before taking possession after the alienor's death, repay the benefit so received. The Courts are, therefore, wrong in their phraseology when they write of a reversioner in such a case "redeeming" the land after the death of the alienor. Perhaps in a sense the operation of paying the money assessed is a redemption, but the use of the word obscures the real meaning of the situation; and, in our opinion, ambiguity and inconvenience would be obviated if Courts

* The following observations apply *mutatis mutandis* to the case of an alienation by a widow or other female, holding a life estate.

in such cases were to draw up decrees according to the following model :—

“ It is hereby declared that the sale shall not take effect at all against the reversioners after the death of X (the alienor) ; but it is also declared that upon the death of X the reversioners shall not be entitled to possession of the land in suit until they have paid the sum of Rs. *y* to defendants Nos. ——— or their successors in interest.”

The case of a mortgage by a sonless male proprietor should be treated on the same general lines. If the Court finds that *qua* reversioners only *x* rupees out of the mortgage-money (*y* rupees) is a valid burden on the land, the Court should not say it converts a mortgage for *y* rupees into a mortgage on some terms for *x* rupees. We know of no law under which this can be done. What the Court can and should do, is to hold that the mortgage contract in suit is not at all binding on reversioners inasmuch as, part of the consideration having, *qua* the reversioners, never passed, the mortgage under a well-known rule of law wholly fails ; and it should then go on to find that reversioners, having been benefited to the extent of *x* rupees, must, before recovering possession upon the mortgagor's death, pay back *x* rupees, the amount of the benefit received. The decree would thus run in this way :—

“ It is hereby declared that the mortgage in suit shall not take effect at all against the reversioners after the death of X (the mortgagor) ; but it is also declared that upon the death of X the reversioners shall not be entitled to possession of the land in suit until they have paid the sum of Rs. *x* to defendants Nos. ——— or to their successors in interest.”

In the present case, though the decree of the Chief Court, dated 25th July 1908, is not in the above form, we think the meaning is, as we have stated.

So far we have given our own views of the case without setting forth the ingenious arguments of Mr. Muhammad Shafi on behalf of the appellants. We will now briefly notice those arguments.

He first contends that the mention of Ida's death in the declaratory decree of the lower Appellate Court is mere surplusage, and can give rise to no inferences against his clients. We, however, are inclined to think that the mention of that contingency goes some way towards showing what

was in the Divisional Judge's mind, and so presumably in the mind of the Chief Court Bench on 25th July 1908.

Next, he argues that, as the mortgage is nowhere ruled to be wholly ineffective against reversioners, it is to be taken as interfered with only to the extent actually stated. This would be an argument of some force if we could ignore (a) the pointed references in the decrees of the first Court and of the lower Appellate Court in the litigation previous to Ida's death, and (b) the true meaning of such decrees and the powers of Courts in dealing with such cases as set forth above.

Then he refers us to page 248, paragraph 4, Punjab Record of 1887 (the famous case *Gujar v. Sham Das*), ⁽¹⁾ and on the strength of the maxim that reversioners cannot cavil at the form of an alienation as such, argues that, when nothing is ruled about the form, it remains intact; and he also refers us in the same connection to *Puran Singh v. Kesar Singh*, ⁽²⁾ and *Milkhī v. Fatlu*. ⁽³⁾ The maxim clearly only applies where the consideration is passed in full as for "necessity"; and, as a matter of justice and equity, it would clearly be unfair to stereotype an onerous condition such as a 60 years' term for redemption, perhaps fair enough in the case of a mortgage of high amount, when that amount had been reduced. But, apart from this aspect of the case, there is nothing in the argument which can be held to refute the views we have stated above.

Lastly, an attempt is made on both sides to apply section 13 of the old Civil Procedure Code (section 11 of the new) to the case. Basing his argument on explanation III (old Code) Mr. Shafi contends that, inasmuch as the 60 years' term was not expressly struck out, the prayer that it should be struck out must be held to have been refused. This strikes us as a little pedantic. Plaintiffs asked that the mortgage as a whole be declared ineffectual as against them and they obtained a decree, that that mortgage should be deemed binding only in this, that Rs. 1,666 must be paid before possession could be taken. In effect this decree does strike out the aforesaid term. As regards the argument of the respondents based on the withdrawal and dismissal of paragraph 5 of the cross-objections aforesaid, we need not say much. As we hold that the decrees all through mean that the 60 years' term is removed, it is unnecessary to discuss the point.

For these reasons we dismiss this appeal with costs.

⁽¹⁾ 107 P. R., 1887, F. B. ⁽²⁾ 39 P. R., 1907.
⁽³⁾ 40 P. L. R., 1903.

Privy Council.

No. 93.

Present : Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, Sir Arthur Wilson.

RUP NARAIN AND ANOTHER, —(PLAINTIFFS), —APPELLANTS,

Versus

MUSSAMMAT GOPAL DEVI AND OTHERS, —(DEFENDANTS), —RESPONDENTS.

Civil Procedure Code, 1882, sections 31 and 578—Misjoinder of causes of action—no ground for appeal—Power of Court to refuse to entertain pleas raised too late—Estoppel—Custom—Widow's alienation—Effect of consent of collaterals—Adoption of daughter's son.

Held, that though by strict Hindu Law a daughter's son cannot be adopted, this general rule may be varied by family custom and often is so varied in the Punjab.

Held, also, that the District Court was right in refusing to entertain a new plea challenging the validity of an adoption (the solution of which must be dependent upon evidence), when it was put forward at the very last stage of the hearing after all the evidence was closed.

Held, also, that a widow cannot by deed provide for the descent of property (which she has inherited from her husband) after her death, in a line different from that prescribed by law either with or without the consent of reversioners.

Held, also, that the plaintiffs claiming title from an adopted son are not estopped by reason of their father having signed a sale deed as a witness, made by the widow of the adopted son, and the latter's mother, in which they claim title derived from the adoptive father and from the collaterals of the adoptive father and not from the adopted son.

Held, also, that it is doubtful whether upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there is a misjoinder of causes of action in a suit when plaintiffs as reversioners sue for a declaration in one suit in regard to several alienations made by widows.

And further that section 578 of the Code of Civil Procedure has the effect of preventing such a defect of misjoinder from being made a ground of appeal.

*Appeal from a decree of the Chief Court, Punjab (Chatterji and Robertson JJ.), dated 11th June 1904.**

[Delivered by Sir Arthur Wilson.]

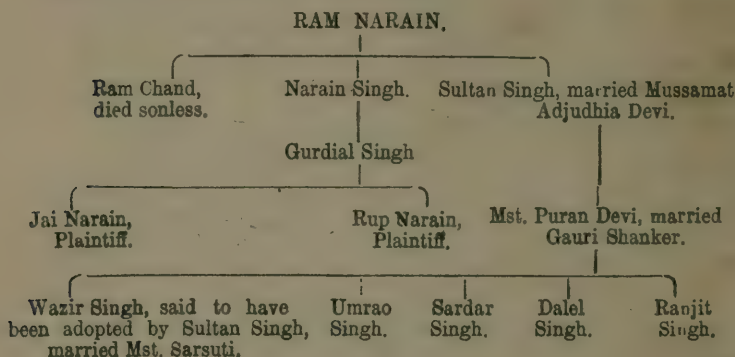
The suit out of which this appeal arises was brought by 11th May 1909. the present appellants against a number of persons as defendants. The plaintiffs, alleging themselves to be prospectively reversionary heirs to an estate now enjoyed by two ladies,

*Reported as No. 1, P. R. 1905.

claimed a declaration that certain alienations, four in number, of portions of the estate made by those ladies were not binding on the reversioners.

Both Courts in India have agreed that there was no such legal necessity as could justify the alienations; and their Lordships have not been asked to review that finding.

The questions which do arise are of quite a different character. It is necessary to follow the pedigree of the family in order to appreciate the contentions raised on each side. The pedigree, so far as material, is as follows:—



The properties in question formed part of the estate of Sultan Singh, who died in 1861. He was succeeded by Wazir Singh. Wazir, as will be seen by the pedigree, was the eldest son of Sultan's daughter, and, according to the case of the plaintiffs, was adopted by Sultan.

It is not disputed that, if Wazir was the adopted son of Sultan, the present plaintiffs are competent to maintain this suit as reversionary heirs of the estate of Wazir. If Wazir was not such adopted son, the plaintiffs (appellants) have no right to sue.

The first important question, therefore, is whether Wazir was the adopted son of Sultan.

On this question the Courts in India have differed. The District Judge of Umballa, who tried the case, thought the adoption proved. The Chief Court took a different view. The adoption, if it took place, was about fifty years ago, so that direct evidence of much value could hardly be looked for.

Their Lordships are of opinion that the adoption is established. Before the death of Sultan in 1861 Wazir is described as his adopted son. On the death of Sultan, Wazir succeeded to the estate without controversy, which he could only have done as adopted son, and enjoyed it and disposed of it as his own without controversy down to his death in about 1870. Almost every document, both during the life of Wazir and since his death, is framed entirely upon the basis of the adoption.

It was sought to raise another point in connection with the adoption, that if it took place in fact, it was invalid in law on the ground that under Hindu law a daughter's son could not be adopted. With this point their Lordships think the District Judge dealt rightly. The general rule of Hindu law cannot be disputed, but it may be varied by family custom, and often is so varied in the Province from which this appeal comes. If the legal point had been duly raised in proper time by the pleadings or issues, it would have been examined with the aid of any evidence adduced on either side bearing upon the question. But it was not so raised. It was put forward for the first time at the very last stage of the hearing after all the evidence was closed, and when nothing but argument remained. Their Lordships think that the District Judge was right in refusing to entertain at that stage a new question of this kind of which the solution must be dependent upon evidence.

For these reasons their Lordships are of opinion that the appellants have established their right to maintain the present suit.

The second question of importance is, as to the effect of the alleged assent of one Gur Dial Singh, the father of the plaintiffs, to the disputed transactions or some of them. Gur Dial witnessed an important document of the 3rd of September, 1871, and one of those of transfer, and it was said that by so doing he was estopped from disputing the validity of the alienations, and that his sons, the now appellants, were similarly estopped.

On this question the first Court decided in favour of the plaintiffs; the Chief Court of the Punjab held otherwise, and considered that the estoppel contended for bound Gur Dial, and also the plaintiffs, his sons. This decision involves two propositions—first, that Gur Dial was estopped, and secondly that the estoppel was binding upon his sons. The second of these propositions it is immaterial to consider unless the estoppel against Gur Dial is first accepted; and, in order to see whether

it should be so accepted or not, it is necessary to examine the documents upon which it is based. The document of the 3rd September, 1871, is the most important of them, and it affords a very clear indication of the positions taken up by the parties. It purported from its title to be a deed of partition executed by Sarsuti, the widow of Wazir, in favour of Puran Devi, his natural mother.

The most notable point about this deed is that according to its terms Sarsuti is the only person who conveys anything, and this is in accordance with the recitals, which allege that Wazir was the adopted son of Sultan Singh, and that Sarsuti, Wazir's widow, had succeeded him on his death. The next notable point about the deed is that, with the exception of the last few lines of the operative part, everything contained in the deed is within the rights of the executant as heiress of her husband, because she purports to deal only with her life estate. The exception in those last few lines purports to affect the devolution of the inheritance after the deaths of Sarsuti and Puran, which was clearly beyond Sarsuti's powers as the widow of Wazir.

The contention being that Gur Dial, by having signed this deed, became an assenting party to the transaction embodied in it, it is necessary to consider what the nature of that transaction is. It is one by which Sarsuti professes to divide her life-interest with Puran, which she could do without any assent of Gur Dial. It purports, secondly, to provide for the descent of the inheritance after her death in a line different from that prescribed by law, a thing which apparently she could not do either with or without the consent of reversioners.

The second document relied upon was one, dated the 1st July, 1888, purporting to be the deed of sale by Sarsuti and Puran, containing one of the alienations impugned in the suit. The most obvious peculiarity of this document is that it is framed on a basis altogether inconsistent with that of the document last referred to.

It recites that the two ladies inherited the property in question with other property from Sultan Singh by virtue of their right of succession, and also by reason of abandonment and relinquishment of their rights by all the collateral heirs of Sultan. They then refer to the document of the 3rd September, 1871, and another document. They say that they, the execu-

tants, have been absolute owners by exercising proprietary rights. They go on to convey the land to the purchasers absolutely, and they proceed :—

“ Now and hereafter neither we nor our reversionary heirs
“ nor any other persons coming forward as claimants by right
“ of succession or by virtue of their being male descendants
“ of the aforesaid family shall raise any sort of objection
“ . . . Even if the heirs of the family of the above-named
“ Munshi had any sort of right, whether vested or contingent,
“ in the property in question at all, such right has been
“ extinguished by their putting their signatures to this
“ deed and admitting its contents to be correct.”

The deed was executed by Sarsuti and Puran and witnessed, amongst others, by Gur Dial.

Assuming that Gur Dial effectually assented to this document, the document itself must be looked at, in order to see what it was that he assented to. And on the face of the document, it is clear that all it professes to do, is to bind the ladies themselves who executed the deed, and the collateral heirs of Sultan from whom they claim to have derived title. It does not profess to affect any title coming from Wazir. But the present plaintiffs claim title from Wazir, and are, therefore, unaffected by any estoppel arising from Gur Dial's assent to the deed.

Another point raised on behalf of the respondents was that, at any rate, the respondents, or some of them, had spent money upon the properties purchased by them, and that such persons could not be evicted without compensation. On this point it is enough to say that it does not arise on this appeal, and cannot arise till the death of Sarsuti. Their Lordships, therefore, have only to say that they abstain from expressing any opinion upon the question and from saying anything which could tend to prejudge the question in case it should be raised hereafter in due time and in due manner.

Another question discussed in argument was, whether the Chief Court was right in the mode in which it dealt with an alleged misjoinder of causes of action. Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case,

And if there was any such misjoinder, section 587 of the Code has, in their Lordships' opinion, the effect of preventing such a defect from being made a ground of appeal and from being dealt with on appeal as it was dealt with by the Chief Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored, but with costs in favour of the plaintiffs, and without prejudice to the right of such of the respondents as claim to have expended money on the properties, respectively purchased by them, to raise the question of compensation in such manner as they may be advised.

The respondents will bear the costs of this appeal.

Appeal accepted

No. 94.

Before Hon'ble Mr. Justice Kensington and Hon'ble Mr. Justice Johnstone.

HIRA SINGH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

GURBAKHSI SINGH,—(PLAINTIFF),—RESPONDENTS.

Civil Appeal No. 798 of 1907.

Custom—Religious institution—Darbar Sahib, Amritsar—Adopted son—succession to rozina dues—Hindu law not applicable.

Held, that an adopted son does not come under clause (b) of the *Dastur-ul-Aml* of Darbar Sahib, Amritsar, and therefore cannot succeed to the rozina dues of the said institution; the matter is not one to be decided under Hindu law but under the custom and practice of the institution.

Further appeal from the decree of Captain B. O. Roe, Additional Divisional Judge, Amritsar Division, dated the 2nd January 1907.

Sheo Narain, for appellants.

Dhanraj Shah, for respondent.

The judgment of the Court was delivered by—

31st March 1909.

JOHNSTONE, J.—A single judgment is sufficient for the disposal of this appeal and No. 423 of 1908.

KARM SINGH.

Sobha Singh
(widow Khem Kaur),
defendant.

Harsa Singh
defendants 2 and 3

Jassa Singh.

On 13th February 1895 Sobha Singh by registered deed adopted Gurbakhsh Singh, plaintiff. On 1st November, 1901 he executed a deed of gift of a shop in favour of Gurbakhsh Singh, calling him his adopted son, and on the same day he executed a will bequeathing to the same person $\frac{1}{4}$ of a house and certain dues he received from the *Darbar Sahib*, Amritsar, called *rozina*. On 20th April 1902 he executed another will cancelling that will and leaving his property to *Mussammatt Khem Kaur* for life, and after her to defendants 2 and 3. On 28th April 1902 he executed another will, cancelling the gift of 1st November 1901 and disinheriting plaintiff. When he died in 1903, defendants took possession, plaintiff then brought one suit—see Civil Appeal 798 of 1907—for a declaration that he was adopted by Sobha Singh and an injunction as regards the *rozina*; and another suit—see Civil Appeal 423 of 1908—for possession of the aforesaid shop and one-fourth share of house. The first Court gave him decrees in both suits. The learned Divisional Judge upheld the decree as regards *rozina*, but set aside the decree as to shop and share in house.

Defendants appeal again as to *rozina* and plaintiff appeals as regards shop and share in house.

It is a pity the learned Divisional Judge did not give due effect to the *Dastur-ul-Aml* of the *Darbar Sahib*, a document setting forth authoritatively *inter alia* the rules of devolution of *rozina* dues. He has dealt with the matter as if it was merely an ordinary case of succession under Hindu law, and so plaintiff, being adopted son, was bound to succeed. The learned (present) Chief Judge in his referring order sets forth with sufficient detail and with complete accuracy the appropriate provision in the *Dastur-ul-Aml*, the result of which plainly is that—

- (a) No sharer in *rozina* may mortgage or sell his share.
- (b) On death of a sharer his share will go to his male descendants if they are well behaved.
- (c) If he has no male issue, he may, by written deed executed in presence of all the co-sharers, give away his share to his daughter's son or to any of his Sikh disciples (*chelas*).

Now though plaintiff in his plaint claimed to be a *chela* of Sobha Singh, he has made no attempt to prove this, and the assertion may be ignored, the only question, therefore, is whether an adopted son comes under (b) above. In our opinion he does not. As *Pandit Sheo Narain* has rightly pointed out, the matter is not one to be decided under Hindu law but under the custom and practice of the insti-

tution. *Nur Muhammad v. Ghulam Habib* ⁽¹⁾ and *Sain Das v. Mussammat Sahib Devi* ⁽²⁾. The *Dastur-ul-Aml* was drawn up in 1859. It was apparently not very strictly followed up to 1877, but has been rigidly enforced since then. See Civil Appeal 377 of 1884 and Civil Appeal 715 of 1894. Mr. Dhanraj Shah admits that, though there are between 300 and 400 families of *pujaris*, his client cannot give a single instance of an adopted son succeeding to *rozina*. He is able only to attempt to make three points—first, that under Hindu law an adopted son is in every way exactly on a level with a real son, secondly, by section 3, (53), General Clauses Act “son” includes adopted son, where, the person concerned can make an adoption under his personal law; thirdly, the *Dastur-ul-Aml* does not prohibit adoption. The first point is irrelevant, as shewn above. The second fails because the section has no bearing upon the meaning of words in such a document as this; and the absence of prohibition of adoption is useless against the circumstance that in practice no adopted son has ever succeeded to *rozina*. Budha’s case, dealt with in the oral evidence, was not one of adoption and has clearly no value here. We accept the appeal of the defendants in Civil Appeal No. 798 of 1908 and dismiss plaintiff’s suit with costs throughout.

* * * * *

No. 95.

Before Hon’ble Mr. A. H. S. Reid, Chief Judge, and Hon’ble Mr. Justice Robertson.

MANAK CHAND,—(PLAINTIFF),—APPELLANT,
Versus

MUNNA LAL,—(DEFENDANT),—RESPONDENT.

First Appeal No. 223 of 1908.

Custom—Adoption—Jains of Delhi—Widow’s power to adopt—Ceremonies and publication—Age of adopted son—Married man may be adopted, also brother of widow’s husband.

Held, that by special custom among Jains—

(a) adoption is a purely secular transaction without any religious meaning,

(b) a sonless widow may adopt without any authorisation of her husband,

(c) no special ceremonies are necessary, all that is required is consent on both sides and due publication by some means recognized among the brotherhood,

⁽¹⁾ 106 P. R., 1892.

⁽²⁾ 140 P. R., 1892.

- (d) the distribution of *ladus* is sufficient publication in Delhi,
 (e, there is no limit to the age of the adopted son,
 (f) a married man with children may be adopted and so may a brother of the husband of the adopting widow, and
 (g) that it has not been proved that the adopted son must be younger than the adopting widow.

First appeal from the decree of T. P. Ellis, Esquire, District Judge, Delhi, dated the 23rd December 1907.

Muhammad Shafi and Shah Nawaz, for appellant.

Shadi Lal and Sardha Ram, for respondent.

The judgment of the Court was delivered by—

ROBERTSON, J.—The suit now before us was brought by one Marak Chand for possession of half of the estate of one Shadi Ram, who died about eight years before suit, leaving one daughter, Mussammat Mangi, no son, a widow, Mussammat Birji, and two brothers, Manak Chand, plaintiff, and Munna Lal, defendant. 3rd April 1909.

The parties are Jains of Delhi of the *Aswal* branch. The suit is one for a half of the estate of Shadi Ram, to which Manak Chand alleges his right to be superior to that of Mussammat Mangi, Shadi Ram's daughter, who, however, is not a party to this suit. Manak Chand admits Munna Lal's right to one-half. Munna Lal's answer to the claim is that he was validly adopted by Mussammat Birji and consequently takes the whole of the estate of Shadi Ram. The adoption is alleged to have taken place in December 1903.

It appears from the record that about a month before the alleged adoption took place, Manak Chand sent a notice to Munna Lal warning him not to have himself adopted by Mussammat Birji. This is dated 23rd November 1903. Exhibit A.

The adoption is alleged to have taken place in December 1903.

[After discussing the evidence and finding that the *factum* of the adoption is established, the judgment proceeds] :

The next point we will proceed to dispose of is the question whether the adoption was a valid one or not. It is admitted on all hands that if no special custom is proved to obtain as regards any matter among the *Jains*, we must fall back upon Hindu law as the rule of decision. *Sheo Singh Rai v. Dakho* ⁽¹⁾, *Chotay Lal v. Chunnoo Lal* ⁽²⁾, *Bachebi v. Makhan Lal* ⁽³⁾.

⁽¹⁾ I. L. R., All. 688, P. C. 188. ⁽²⁾ I. L. R., IV Cal., 744 and VI I. A. 15.

⁽³⁾ I. L. R., III All., 55.

Jains are admittedly an offshoot of Hinduism, but an offshoot which was separated from the parent stock before many of the customs now accepted as orthodox by Hindus were started or crystallized, and it is not contested that adoption is a very different thing and is looked upon from quite a different standpoint among Jains from what it is among orthodox Hindus. There has been much discussion before us as to the *dattaka* and *kritrima* form of adoption, but it is quite clear that neither is in force among Jains. The *dattaka* clearly is not, and as to the other all that can be said is that Jain adoption resembles it more than it resembles the *dattaka* form, which is now recognized in most regions as the orthodox form. That Jain adoption is something quite different from Hindu orthodox adoption is abundantly proved by the evidence on the record as well as by numerous rulings and authorities. Mayne (Hindu Law, VII Ed., para. 131, p. 168) says in regard to Jain adoption: "Among the Jains a sonless widow "has the same power of adoption as her husband would have "had, had he chosen to exercise it. Neither his sanction nor "that of any other person is necessary to it. The Court said "of this class.....They also regard the birth of a son as having "ing no effect on the future state of his progenitor and consequently adoption is a merely -temporal arrangement and has "no spiritual objects."

Again at p. 200 we have "Among the Jains no ceremonial "whatever is required, the transaction being purely a matter of "civil contract." The published rulings on the subject bear out this view, particularly those printed in *Lakshmi Chand v. Gatto Bai* (1), *Manohar Lal v. Banarsi Das* (2), and *Asharfi Kunwar v. up Chand* (3). It is not indeed denied that Mussammatt Birji had power to adopt, it is only contended that Munna Lal by reason of various disabilities was a person who could not be adopted, and that the necessary ceremonies were not observed. As regards ceremonies, we think we need not spend much time over this part of the case. The general trend of the evidence for both parties is, that consent on both sides, of the adopter and the adoptee if he be an adult, or of some one on his behalf if he be a minor, and due publication, is all that is required. The method of publication varies. In some cases it is by distribution of cocoanuts, in others in various other modes. But as regards Delhi we think the evidence clearly shows, that a public distribution of *ladus* to the brotherhood in token of an adoption fulfils all the requirements as to publication. Indeed it was hardly

¹) I. L. R., VIII All., 319.

⁽²⁾ I. L. R., XXIX All., 495.

⁽³⁾ I. L. R., XXX All., 197.

contended that such a distribution, if clearly made by the adopter and adoptee or his guardians together, would not be sufficient publication, and we think from the evidence and authorities that it clearly would be.

Much more stress was laid on the contentions that the defendant Munna Lal could not be adopted, being a married man, the father of a child, the brother of the person to whom he was adopted, and a man older than the adopting widow, Mussammat Birji.

As regards marriage, there seems to be no doubt whatever that among Jains marriage alone on the part of the person adopted is no bar. This is specifically laid down in *Manohar Lal v. Banarsi Das* (1) in which the adoption of a married man of 23 was held to be valid, a view followed in *Asharfi Kunwar v. Rup Chand* (2). In the first case the adoption of a married man of 23 was held to be valid after a full discussion of the whole question. In that case, as remarked by the learned Judges, the main question for decision was whether among the Jain community marriage is a bar to adoption. In the same case, *Manohar Lal v. Banarsi Das* (1) it was remarked: "We have not the slightest doubt that married boys were and are adopted, and that the evidence in support of these adoptions is truthful. If it be, we have 23 cases established, namely, nine in Muzaffarnagar, seven in Saharanpur, three in Delhi and four in Meerut. Considering that the Jain population is not large and is scattered about, and that ordinarily unmarried boys would be selected in adoption, the number of cases of adoption of married youths or boys, which has been proved, is striking." One of the Delhi instances discussed in that judgment is an instance mentioned in this case by the witness Bhola Nath, that of Jaggi Mal. In *Asharfi Kunwar v. Rup Chand*, (2) the question was further discussed and in addition to the 9 of the 23 instances noticed in *Manohar Lal v. Banarsi Das* (1) a number of other instances were discussed, and it was finally concluded that upwards of 30 instances of the adoption of married boys amongst the Jains of the Saharanpur, Muzaffarnagar, Meerut, Delhi and Karnal districts had been satisfactorily proved.

As regards the evidence on the record of this case we find that among the plaintiff's own witnesses Kishen Singh, P. W. 1, says,

(1) I. L. R., XXIX All., 495.

(2) I. L. R., XXX All., 197.

"that even if a person has children he can be adopted;" Kishen Raj, P. W. 2, says, "a married man can also be adopted, but his age must be less than that of the widow who makes the adoption;" Rattan Raj, P. W. 3, says, "such a married man can be adopted even though he has children;" Rao Raja Madho Singh, P. W. 4, says, "a woman can adopt a married man with family of her own accord;" Fanj Chand, P. W. 5, says, "mostly a boy of tender years is adopted, but if in any case such a boy cannot be found, then the widow can adopt a married person;" Jaswant Mal, P. W. 7, says, "a married person may also be adopted;" Mohan Raj P. W. 8, says, "In our brotherhood a married person with a family may be adopted;" Shankar Das, P. W. 9, says only, "I know of no instance in which a married man was adopted as a son;" Daler Singh, P. W. 10, says "married men can be adopted according to custom;" Sohan Lal, P. W. 11, says, "a married man may be adopted;" Thus, practically, every witness called for the plaintiff himself says, that a married man may be adopted, and not one of them contradicts this statement. In face of this, for the purposes of this suit at any rate, it might well be held that the legality of the adoption of married men is proved, and it was not necessary for the defence to put forward much evidence in support of the contention

Kalu Mal, D. W. 3, however, gives an instance in which one Piare Lal, already married, was adopted by one Indarjit, and Khushal Chand confirms this instance. Sahu Mal, D. W. 13, gives a number of instances and Kesri Mal, D. W. 14 also mentions several instances. Piare Lal, P. W. 16, also speaks to the instance in which Piare Lal was adopted by Indarjit, and Banarsi Das gives another instance in which one Banarsi Das of Meerut, who had a wife and children, was adopted by the widow of his brother Ganeshi Lal. The evidence on the record and the authorities dealing with cases in neighbouring tracts conclusively prove that adoption of married men among the Jain community are legal.

It is further urged that among the Jain communities a brother cannot be adopted to a brother, and it is further urged that even if a brother could be adopted, it must be a brother younger than the widow who adopts. To this the reply is made that there is no restriction as to age whatever, and the pertinent remark is made that if there were any such restriction, it would surely only be that the brother adopted must be younger than the brother to whom he is adopted,

not that the widow must be older than the adopted brother, and it is pointed out that in this case the widow making the adoption was a second wife, very much younger than Shadi Ram, and only 4 or 5 years younger than Munna Lal, who was himself much younger than Shadi Ram, who brought him up.

It is probably correct to say that the adoption among Jains is not the *kritrima* adoption, but it is certainly equally correct to say that it very much resembles that form, which as Mayne points out, is among orthodox Hindus, not known beyond the Mithila-circle*.

Now as regards *kritrima* adoptions, there appears to be no doubt that the adoption of a brother is lawful, Mayne says, "hence any person may be adopted who is of the same tribe as his adopter even his own father, or a brother.†

*Mayne¹ VII Ed.,
p. 136, para. 107.

†Mayne, VII Ed.,
p. 265, para. 203.

It was pointed out in *Manohar Lal v. Banarsi Das* (1), page 510, that it was admitted that among Jains a boy may be adopted at any age and this was repeated in *Asharfi Kunwar v. Rup Chand* (2) page 205, and it is also pointed out in both those judgments that while the defendant contended that the custom of adoption among the Jains was a purely secular matter, it was only urged for the plaintiff that the custom of adoption among Jains is similar to that binding among the Sudras, and not that obtaining among the twice-born classes, i. e., that it resembled the *kritrima* form, if any. Mr. Galap Chandra Sarkar in the Tagore law lectures of 1888, says: "Nor is the restriction based upon the age of the adoptee applicable to the Jains, among whom the rule is, that a person within the age of 32 may be adopted." This quotation regarding the age of 32 is taken from an old and arbitrary *dictum* of the Pandits and does not appear to have any authority. No reported case was quoted in which the adoption of a brother had been held to be valid, but on the other hand none was quoted in which it was held to be invalid, nor was any case quoted in which an adoption was held invalid because the adopted son was over 32.

As regards the evidence on the record of this case, it is distinctly in favour of the contention that a brother may be adopted regardless of age.

Turning first to the evidence of the plaintiff's own witnesses, we find Kishen Raj stating that he himself was adopted by

(1) I. L. R., XXIX All., 495.

(2) I. L. R., XXX All., 197.

Karm Raj, his own brother's son, nephew. He also says that one Man Chand adopted Baldeo Chand, his younger brother, who was about 40. Fauj Chand also bears testimony to this last adoption, and adds that Baldeo Chand had a daughter at the time. The case of Kishen Raj's adoption by his nephew Karm Raj, is also supported by Kishen Singh, P. W. I., and also by Mehta Jaswant Mal. Seth Mohan Raj does not quote any instance, but says "uncle may be adopted by his nephew, "brother may be adopted by brother."

Turning to the evidence for the defendant, we find several instances of the adoptions of brothers and first consins given. In the evidence of Sahu Mal we find that one Mai adopted his uncle's son, Gulab Chand, who was married.

As to age, Tara Chand adopted Kishen Chand, married and aged about 40.

Nathu Lal's widow adopted Lal Chand, aged 50, who was Nathu Mal's own brother. Lalmia's widow adopted her husband's brother Gulab Chand, aged 25 or 28.

Kesru Mal died leaving a widow, aged about 15, and a father. His widow adopted his younger brother Chand Mal, about 35, who was married and had two sons and a daughter. The next instance which we will quote is a curious one and shows how free from restriction is the Jain custom of adoption. One Bahadur Mal died when young, his son also died young. Bahadur had a cousin named Munji. This Munji was adopted by Bahadur Mal's mother, wife, and daughter to Bahadur Mal's son. Munji was about 24 years old and married.

One Choigi died, his widow adopted Mul Chand, his younger brother, who was 45 or 50 at the time and was married. In this case the witness mentions that no other brother was alive at the time, and he added that he could not recall any other cases at the moment, but that there were plenty of instances. There was no attempt made in cross-examination to discredit these instances nor was any attempt made to rebut this evidence and all that the learned counsel for the appellant could urge against these instances before us was that there may have been no brothers or collaterals competent to object.

We have listened with great care to the arguments in this case, lasting over several days, and have examined the authorities on the subject and the evidence on the record, and we have come to the conclusion that it has been shown that among Jains

no special ceremonies are necessary to give legal effect to an adoption, and that though certain ceremonies or rules are observed in certain localities as a matter of habit, all that is actually required is that there shall be due publication of the adoption by some recognized means among the brotherhood, and we find that in Delhi at any rate the distribution of *ladus* in token of an adoption having taken place is sufficient. We find that in this case Munna Lal was adopted to Shadi Ram, his elder brother, by Mussammat Birji and gave himself in adoption and that this was all that was necessary on his part, he being an adult and his father dead, although his mother is alive. According to some witnesses she was present, but we need not go into that. We find further that among the Jains adoption is a purely secular transaction designed, *inter alia*, to perpetuate the name and family of the adopter without any religious meaning, and that though the adoption is not an adoption in *kritrima* form as known among orthodox Hindus, it approximates far more to that form than to the *dattaka* form. We find that the widow of a deceased Jain may adopt without any authorization from her husband. We note that it was not even contended that this was necessary, and we hold that there is no limit as to the age of the adopted son. There are some witnesses who say that he should be younger than his adoptive father, but the contention that he must be younger than the adoptive father's widow is certainly not made out. It is clearly made out that a married man having children of his own may be adopted.

These findings dispose of the appeal which fails and is dismissed with costs.

Appeal dismissed.

No. 96.

*Before Hon'ble Mr. A. H. S. Reid, Chief Judge, and
Hon'ble Mr. Justice Robertson.*

MUSSAMMAT ALLAH RAKHI,--(DEFENDANT),—
APPELLANT,

Versus

ZAKAR HUSSAIN AND OTHERS—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 572 of 1909.

*Custom—Succession of daughter to her mother's estate—Syeds of mauza
Kasanian, tahsil Batala, district Gurdaspur.*

Held, following *Shah Nawaz v. Azmat Ali* ⁽¹⁾, that Syeds of *Masania*, *tahsil Batala*, district *Gurdaspur*, are governed by the general rules of agricultural custom of the Punjab.

Held, also, that land which has come to a daughter from her father and has become her absolute property and has been gifted by her to her husband, reverts to her on his death and descends to her daughter as her heir, and not to the collaterals of her deceased husband.

Further appeal from the decree of W. A. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated the 1st April 1908.

Muhammad Shafi, for appellant.

Jalal-ud-din, for respondent.

The judgment of the Court was delivered by—

19th April 1909.

REID, C. J.—This appeal and appeals 573 and 834 of 1908 can be disposed of together, three appeals from the decrees of the Court of first instance having been disposed of together by the lower Appellate Court and the evidence in the two suits being the same.

The facts are recorded in the judgments of the Courts below.

The following are the authorities cited at the hearing :—

Rehmat Ali v. Mussammatt Hamid-ul-Nissa ⁽²⁾, that among *Ambala* Syeds, daughters succeed to father's share on death of their mother. *Lala v. Pamesarya* ⁽³⁾, that possession of property for 25 years raises presumption of grant of user from owners.

Gopal v. Mussammatt Mamu ⁽⁴⁾, that among *Gujars* of *Lahore* city daughter succeeds before nephew.

Kutha v. Mussammatt Abidan ⁽⁵⁾, that among *Muhammadians* in the *Gujrat* district the burden of proving daughter's power to transfer by gift her share of father's property is on the person asserting the power. *Mussammatt Ghulam Zokra v. Rukn Abdulla Shah* ⁽⁶⁾, that among *Gardezi* Syeds of *Multan* first cousin excludes daughter's daughter.

Muhammad v. Amir ⁽⁷⁾, that among *Jhang Sials* the burden of proving a special custom in favour of a daughter's heir is on the person asserting it against her father's collaterals.

⁽¹⁾ 40 P. R., 1907.

⁽²⁾ 75 P. R., 1879.

⁽³⁾ 78 P. R., 1883.

⁽⁴⁾ 41 P. R., 1885.

⁽⁵⁾ 19 P. R., 1887.

⁽⁶⁾ 18 P. R., 1889.

⁽⁷⁾ 31 P. R., 1889.

Ramzan Shah v. Sohna Shah ⁽¹⁾, that among Sabzwari Syeds of Gurdaspur second cousin once removed does not exclude daughter.

Mussammat Fatima v. Ghulam Muhammad Shah ⁽²⁾, that among Jullundur Syeds, daughters and their sons exclude male collaterals of the 4th degree from the common ancestor.

Kosim Ali v. Zinat-un-Nisa ⁽³⁾, that among Syeds of the Ambala district, though by custom sons exclude daughters there was no established custom that collaterals excluded daughters.

Chiragh Din v. Mamman ⁽⁴⁾, that among Arains of Lahore district, daughter is not full heir to her father in the presence of his nephews.

Mussammat Fatima Bibi v. Gul ⁽⁵⁾, that a Court must ascertain whether custom or personal law is applicable and apply it, and must not dismiss suit based on personal law, on finding personal law inapplicable.

Amir Khan v. Sandhe Khan ⁽⁶⁾, that among Naru Rajputs of Hoshiarpur the father cannot favour one son at the expense of others except for special cause, the burden of proving which is on the person asserting it.

Mussammat Fatima v. Arjmand Ali ⁽⁷⁾, that there is no initial presumption of agricultural custom among Sheikhs of Rohtak, who have been employed for generations in State service and do not live by agriculture, and that daughters consequently succeed in preference to collaterals.

Wazir Ali Khan v. Mussammat Asmat Bibi ⁽⁸⁾, that among Lodhi Pathans of Jullundur district, daughters' daughters exclude collaterals, no custom to contrary being proved.

Hayat Muhammad v. Allah Bakhsh ⁽⁹⁾, that among Waraich Jats of the Gujrat district, property given to daughter's son reverts on his death without issue to donor's heirs.

Samanda v. Mussammat Nurbi ⁽¹⁰⁾, that it was not proved that among Muhammadan Naru Rajputs of Karnal, daughters succeed to ancestral property before collaterals of the 5th degree.

⁽¹⁾ 60 P. R., 1889.

⁽²⁾ 172 P. R., 1889.

⁽³⁾ 35 P. R., 1891.

⁽⁴⁾ 28 P. R., 1893.

⁽⁵⁾ 127 P. R., 1893.

⁽⁶⁾ 72 P. R., 1895.

⁽⁷⁾ 41 P. R., 1901.

⁽⁸⁾ 61 P. R., 1902.

⁽⁹⁾ 19 P. R., 1903.

⁽¹⁰⁾ 36 P. R., 1905.

Saddan v. Khemi ⁽¹⁾, that among Johal Jats of Ludhiana (Hindus) widow of sonless proprietor has life tenure of property, which husband would have inherited from his collaterals.

Daya Ram v. Soheli Singh ⁽²⁾, that among parties generally following customary law, it is permissible to fall back as a last resort on their personal law for decision of point on which no definite rule of customary law can be found.

Shah Nawaz v. Azmat Ali ⁽³⁾ that in matters of alienation and succession, Jilani Syeds of *mauza* Masanian, *tahsil* Batala, district Gurdaspur (the village in which the property in suit is situate), who have for the last nine generations followed agriculture as a land-holding occupation, are governed by the general rules of agricultural custom of the Province, not by Muhammadan law.

The passages from the customary law of the district cited are—

Answer 5, page 15.—Amongst male lineal descendants, where there are male descendants who do not all stand in the same degree of kindred to the deceased, and the persons through whom the more remote are descended from him are dead, the inheritance is divided equally *per stirpes*, not *per capita*, and the nearer descendants do not exclude the more remote.

Answer 19, page 19.—The zamindars of *tahsils* Batala and Pathankot say that a daughter, if she has succeeded to an inheritance, can alienate her property by sale, gift or mortgage, but those of Shakargarh say that a daughter cannot succeed and cannot, therefore, alienate the property.

Answer 27, page 21.—When a wife dies, holding property in her own right, the zamindars of Gurdaspur and Shakargarh say that the whole of the property devolves upon the husband. The zamindars of Batala, except the Syeds, follow the Shakargarh custom. The Syeds say that, if the property was acquired by the woman herself or from her father, the immovable property will go to her father or his heirs and the movable only to the husband.

Answer 8, page 35.—Where the custom of making dowries to daughter obtains, failing her direct heirs, the zamindars of Gurdaspur, Batala, Pathankot and the Muhammadan tribes of Shakargarh say that, according to the *Riwaj-i-Am* of 1865, the estate will devolve upon the heirs of her father, not upon the heirs of her husband.

⁽¹⁾ 15 P. R., 1906.

⁽²⁾ 110 P. R., 1908, F. B.

⁽³⁾ 40 P. R., 1907.

The first question for consideration is whether the 30 *ghumaos* and appurtenant *shamilat* left in Mussammat Begam's possession in 1862 became her property in the sense that she could do what she pleased with it. The award in virtue of which she remained in possession of it contained the words "*Ki arázi ko pás ghair ki bai na karepas mudalian* ki koi karida.*" These words indicate clearly that her right, if dealing with the property, was subject only to the right of pre-emption of the collaterals.

In 1892 the descendants of Kadir Bakhsh, the plaintiffs in the suit of 1862 tried to prevent Mussammat Begam from digging a well and she obtained a decree for an injunction and a declaration of her full ownership, the words used in the judgment being "*bila kisi kaid wa shart ki mili thi, wa wuh malik mustakil tasawar hue thi.*" The Court further found that her husband's collaterals would not take on her death, the daughter taking "*ba mujib Shara Muhamdi.*"

We are satisfied that the first question must be answered in the affirmative.

The lower Appellate Court's judgment runs: "The examination of the arbitrators in 1862 makes it clear that their decision was to the effect that Mussammat Begam was entitled to succeed to the whole of her father's share, but that they had allowed her the 30 *ghumaos* and the 10 *marlas* under the house on account of the relationship between the parties. The parties accepted this award, although both Raja Teja Singh and the Commissioner's Court thought that Mussammat Begam should have been given the whole 63 *ghumaos*. From this, I hold it clear that what was awarded to Mussammat Begam was not absolute ownership but a portion of her father's inheritance."

Mussammat Begam died in April 1904 and the result of the reversioners being allowed possession under the award of 33 *ghumaos*, which should presumably have remained with Mussammat Begam for her life, was that they enjoyed this possession more than 40 years before they would have enjoyed it on her death. The conclusion at which we have arrived is exactly the opposite to that arrived at by the lower Appellate Court and is that the 30 *ghumaos* with appurtenant *shamilat* became the absolute property of Mussammat Begam to dispose of as she pleased.

* This should apparently be *mudalian*.

The land under the houses goes with the 30 *ghumaos* and the houses go with it.

The suit of the descendants of Kadir Bakhsh therefore fails and appeal 573. of 1908 is decreed with costs of all Courts which they will pay to Mussammat Allah Rakhi.

The next question for consideration is whether the sons of Shah Chiragh are entitled to any part of the property in suit.

In our opinion they are not entitled to any part of the 30 *ghumaos* and appurtenant *shamilat* given by Mussammat Begam to her husband Budhe Shah. On the death of the latter the land reverted to Mussammat Begam and was inherited on her death by Mussammat Allah Rakhi not as heir of Budhe Shah but as heir of her mother, Mussammat Begam, to whose absolute property Budhe Shah's collaterals have no right. The customary law of the district is not sufficiently concise to afford much assistance as to the right to the rest of the property in suit, *viz.*, the ancestral property of Mussammat Allah Rakhi's father, Budhe Shah. For instance in answer 19, page 19, what is meant by "succeeding to an inheritance"?

Shah Nawaz v. Azmat Ali (1) is, however, directly in point, Mussammat Allah Rakhi having admittedly married, and is authority for holding that the sons of Shah Chiragh, plaintiffs in suit, No. 103 of 1906, are entitled to the half which they claimed. This appeal and 834 of 1908 are therefore dismissed, but under the circumstances, the parties thereto will bear their own costs.

Appeal dismissed.

No. 97.

Before Hon'ble Mr. Justice Johnstone.

FATEH BAKHSH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS

Versus

LEHNA AND OTHERS—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 54 of 1909.

Punjab Tenancy Act, XVI of 1887, Sections 59, 111 and 112, Statement of custom in a Wajib-ul-Arz cannot override Section 59—agreements limited to term of settlement.

Held, that it is settled law that statements of custom in a Wajib-ul-Arz cannot override section 59 of the Punjab Tenancy Act, 1887.

Held, also, that an "agreement" under sections 111 and 112 of the Act expressly limited to the term of the first Settlement, cannot be held to persist through a later settlement in which the agreement was not renewed.

Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 30th July 1908.

Muhammad Shafi, for appellants.

Sheo Narain, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case the dispute is between landlords (plaintiffs) and the collaterals of two deceased occupancy tenants (defendants). The first Court held that defendants were really collaterals of the deceased but that the common ancestor Bhupa had never occupied the land. Thus section 59, Tenancy Act, could not help the defendants, who relied upon an entry in the *Wajib-ul-arz* of the 1850 Settlement of *maura* Dhandour, Tahsil Jullundur, where the land in suit is. It is settled law (*Fatteh Muhammad v. Mussammat Jiwan* ⁽¹⁾, *Punjab Singh v. Sant Ram* ⁽²⁾) that statements of custom in a *Wajib-ul-arz* cannot override section 59, Tenancy Act, but plaintiffs described this as an "agreement" and invoked sections 111 and 112 of the Act. This was an after-thought and no issue on the subject was framed, but both Courts below took up the question. The entry may be translated thus :—

"If an occupancy tenant dies, his son and, in his absence, "a brother or *karabati*, whoever has the right, will succeed."

The first Court recognised that this amounted to an agreement, but found that it was apparent from the heading of the *Wajib-ul-arz* that its provisions and agreements were expressly limited to the term of that Settlement. In the 1885 Settlement the record is silent, and hence the Court ruled that there is now no agreement in force on this subject, and thus the Court gave plaintiffs, landlords, a decree with costs.

The learned Divisional Judge on appeal found the other way. He went with the first Court through the first steps of its reasoning, but then quoting *Rahiman v. Bala* ⁽³⁾, he ruled that the silence of the Settlement Record of 1885, on the matter in hand, did not imply that the custom was altered, and so forth. In my opinion the Divisional Judge entirely overlooked the fact that the question is not of custom, but of section 59 aforesaid and "agreements" under sections 111 and 112 of the Act. I

(1) 43 P. R., 1895, F. B.

(2) 22 P. R., 1896, F. B.

(3) 8 P. R., 1892.

cannot see how an "agreement," expressly limited to the term of the first Settlement, can be held to persist through a later Settlement in which the agreement was not renewed. This erroneous way of looking at the matter entirely vitiates the Lower Appellate Court's judgment.

In a judgment of my own, in Civil Appeal No. 400 of 1908, I have thrown doubts upon the way in which matters of this sort have been sometimes viewed, and especially as to the meaning in connection with "agreements" in *Wajib-ul-arzes* of such phrases, as *nazdiki bhai* and *karabuti*. But, inasmuch as here I hold that no "agreement" on the subject persisted after 1885, I need not take up that question again.

Mr. Sheo Narain has quoted certain rulings to me, but none of them meets this case. Rulings to the effect that a statement of custom in a *Wajib-ul-arz* of an early Settlement is evidence of custom although a later *Wajib-ul-arz* may be silent on the point, are beside the mark here, as also are rulings as to the precise meaning of such statements of custom.

I accept the appeal and set aside the judgment and decree of the Lower Appellate Court and restore those of the first Court, giving plaintiffs a decree with costs throughout.

Appeal accepted.

No. 98.

*Before the Hon'ble Mr. A. H. S. Reid, Chief Judge,
and Hon'ble Mr. Justice Robertson.*

T.,—(CO-RESPONDENT),—APPELLANT,

Versus

1. B.,—(PETITIONER) }
2. B.,—(RESPONDENT) } —RESPONDENTS.

Civil Appeal No. 421 of 1909.

Matrimonial jurisdiction—Appeal from order of single Judge of Chief Court sitting on original side—Divorce Act (IV of 1869), section 55, Punjab Courts Act (XVIII of 1884), Section 9 (a), Civil Procedure Code, Section 2.

Held, that an order by a single Judge of the Chief Court sitting on the original side, refusing to strike off the record the name of a person impleaded as a co-respondent to a petition for dissolution of marriage and damages, is not appealable.

*Appeal from the order of Hon'ble Mr. Justice Johnstone, Judge,
Chief Court, Punjab, dated the 26th March 1909.*

Beechey, for appellant.

Grey, for (petitioner) respondent.

Oertel, for (respondent) respondent.

The judgment of the Court was delivered by—

REID, C. J.—This is an appeal from an order by a Judge 23rd April 1909.
of this Court, sitting on the original side, refusing to strike off
the record the name of a person impleaded as co-respondent
to a petition for dissolution of marriage and damages.

The first question for decision is whether an appeal lies.

Counsel for the appellant contended that the opening
words of section 55 of the Divorce Act gave an appeal, the
words meaning that all orders made by the Court in any suit
under this Act may be appealed from.

If the first 24 words of the section stood alone, the conten-
tion would have force, but, in our opinion, the subsequent words
of the section defeat the contention and the first paragraph
of the section, as far as the first proviso enacts that the right
of appeal and the course of appeal from decrees and orders
under the Act shall be regulated by the rules regulating such
right and course in respect of decrees and orders of the Court
made in the exercise of its original civil jurisdiction. The
proviso cannot, in our opinion, be interpreted as meaning
that all decrees and orders except those specified therein are
appealable.

Section 9 (a) of the Punjab Courts Act provides for
the course of appeal from decrees and orders made by single
Judges, but does not, in our opinion, confer a right of appeal
from orders not appealable under the Code of Civil Procedure.

C. v. C. (1) was cited for the proposition that an appeal
lies from every order, whether interlocutory or final, but the
head note of that case is erroneous and all that was decided was
that an appeal lay from a final order or decree dismissing on
the merits an application for dissolution of marriage and
damages.

Counsel for the appellant cited *Ramsay v. Boyle* (2), *Percy
v. Percy* (3), *A. v. B.* (4), *R. v. R.* (5).

In the first of these cases an appeal from an order by a
single Judge, refusing to allow a lady, with whom incestuous

(1) 18 P. R., 1903.

(2) I. L. R., XVIII All., 375.

(3) I. L. R., XXX Cal., 489.

(4) I. L. R., XXII Bom., 612.

(5) I. L. R., XIV Mad., 88.

adultery was alleged by the petitioner for divorce, to intervene and enter appearance and adduce evidence and cross-examine witnesses, was entertained and dismissed on the ground that the order was not erroneous.

The question of the right of appeal was not raised or considered and the appeal was under section 15 of the Letters Patent, which provides an appeal from every judgment of a single Judge.

In the second it was held, that the Allahabad High Court had not jurisdiction to entertain an appeal from an order of a District Judge in Oudh, dismissing a suit for dissolution of marriage, the Civil Courts of Oudh not being subordinate to it.

In the third case it was held that an appeal lay against a decree absolute, passed by a single Judge of the Bombay High Court, though the decree *nisi* had not been challenged and that the period of limitation prescribed for appeals from decrees made on the original side applied.

Section 14 of the Letters Patent provides an appeal from the judgment, in all cases of original civil jurisdiction, of one Judge of the Court.

In the fourth case the Madras Court entertained an appeal from an order of a single Judge of the Court, dismissing a wife's petition for increase of *alimony pendente lite*, and further held that an order by a single Judge at settlement of issues, fixing a distant date for the hearing, is not an order under section 156 of the Code of Civil Procedure and is appealable under section 15 of the Letters Patent, which is practically identical with that section of the Calcutta Letters Patent. These authorities do not support the contention that an appeal lies from all orders of a single Judge of this Court under the Divorce Act, the Calcutta, Bombay and Madras cases being appealable under the Letters Patent of the respective Courts, and the Allahabad case having no bearing on the question raised here. Accepting the decision in *O. v. O.* ⁽¹⁾ as being that section 55 of the Divorce Act, read with section 9 (a) of the Punjab Courts Act, gives an appeal from all orders of a single Judge sitting on the matrimonial side which would be appealable if that Judge were trying a civil suit transferred to this Court under section 25 of the Code of Civil Procedure, we are forced to the conclusion that the appeal claimed does not

(1) 18 P. R., 1903.

lie. Under Act XIV of 1882 no appeal lay from an order refusing to strike out a party, though an appeal lay under section 588 (2) from an order striking out or adding the name of any person as plaintiff or defendant, and under the new Code of Civil Procedure no appeal from either order is provided. Counsel for the appellant contended that the definition of *decree* in section 2 of the new Code included the decision that the Court had jurisdiction over the appellant.

We are unable to hold that such decision, so far as regarded the Court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit, either preliminary or final. At page 38 of Woodroffe's and Amir Ali's Code of Civil Procedure, the following commentary on the words *the rights of the parties* appears—"The last Code used the words '*right claimed or defence set up.*' There can, we think, be little doubt that what the legislature originally meant by these words to refer to, were rights of a substantive as distinguished from rights of a merely processual character. In other words, that a decree was, so far as the right claimed, an adjudication on the merits (that is, the right to recover land, money, etc., claimed in the suit), and so far as the defence set up, an adjudication on the defence which might be grounded either on the merits, using that term in its generally accepted sense, or on some point of law affecting the merits, such as limitation. The contrary construction, (1) namely, that the right might be one merely of procedure, appeared to be negatived both by the general language of the section and by the circumstance that if it were correct, there could not be any occasion for specifically making an order rejecting a plaint, a decree, as such an order directly involves an adjudication against the plaintiff's right to proceed with the suit as brought by him."

We concur in this interpretation of the law and hold that the order complained of is not appealable as a decree, merely because it held that the co-respondent was amenable to the jurisdiction of the Court. The result is that we accept the preliminary objection and hold that no appeal lies.

The appeal fails and is dismissed with costs against the appellant in favour of the petitioner-respondent, Counsel's fee eighty rupees.

Appeal dismissed.

No. 99.

*Before the Hon'ble Mr. A. H. S. Reid, Chief Judge, and
Hon'ble Mr. Justice Williams.*

MANSA AND OTHERS,—(DEFENDANTS)—APPELLANTS,

versus

SURTA AND OTHERS,—(PLAINTIFFS)—RESPONDENTS,

Civil Appeal No. 597 of 1908.

Custom—Succession by adopted son collaterally in adoptive father's family—Jats of Rohtak district—Riwaj-i-am.

Held, that among Jats of the Rohtak district an adopted son or his heirs can by custom succeed collaterally to property to which the adoptive father would have succeeded if alive.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated the 4th February 1907.

Duni Chand and Abdul Kadir, for appellants.

Gurcharn Singh, for respondents.

The judgment of the Court was delivered by—

4th May 1909.

WILLIAMS, J.—In this case we have been asked to hold that the lower Appellate Court, which is in concurrence with the original Court on the point, was wrong in deciding that among Jats of the Rohtak district an adopted son or his heirs can succeed collaterally to property to which the adoptive father would have succeeded if alive. The precedents, however, to which we have been referred in support of this contention, relate, with but one exception, to Hoshiarpur, Sialkot and other districts of the Central Punjab, whose position in relation to customary law affords no argument as to the state of things in Rohtak or other parts of the old Delhi territories, which were originally included in what were formerly known as the North-West Provinces. The single other case to which reference has been made (*Jeram v. Manphul* ⁽¹⁾), is indeed one relating to the Sonapat tahsil of the Delhi district, but is silent on the point of succession by adopted sons to collaterals of the adoptive father. On the other hand in Civil Appeal No. 693 of 1902, a Division Bench of this Court decided that it was sufficiently established that in the Rohtak District, in common with other parts of the old Delhi territory, adoption, when effected, is of a

(1) 4 P. R., 1892.

formal nature and not the mere customary appointment of an heir such as is usually met with in the Punjab proper ; and it further added " that the adopted son merges in his new " family and under the Rohtak *Riwaj-i-am* there is no limitation " of his right of collateral succession." From this view we see no reason to dissent and this appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 100.

*Before the Hon'ble Mr. A. H. S. Reid, Chief Judge, and
Hon'ble Mr. Justice Williams.*

SHAMIR AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

versus

LADHA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 61 of 1908.

Limitation—Conditional decree for possession on payment of a sum of money does not create a mortgage or new cause of action—Indian Limitation Act, XV of 1877, section 7 and articles 142 and 144—Minority.

In 1899 plaintiffs sued for possession of the land in suit which was sold by their mother during their minority in 1886 and obtained a decree setting aside the sale and decreeing possession of the land conditional on payment of Rs. 754—no period being fixed for such payment—plaintiffs did not execute their decree, but brought the present suit for possession in 1907, the youngest of them having attained his majority in 1901.

Held, that the conditional decree did not create a mortgage or "judicial hypothec" and that it did not in itself constitute a cause of action and that the decree-holder must fall back on his original cause of action, and as this arose in 1887, the year of dispossession and commencement of adverse possession, the suit is barred either under article 142 or article 144 of the Indian Limitation Act.

Held also, that the fact of the plaintiffs being minors at the date of alienation could only extend the period to three years from the date when the youngest of them attained his majority under section 7 of the Act.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated, the 12th October 1907.

Muhammad Shafi, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

12th May 1909.

REID, C. J.—The facts are stated in the judgments of the Courts below.

We concur in the conclusion recorded by the learned Divisional Judge that the conditional decree did not create a mortgage or “judicial hypothec” on the land in suit.

Buta Singh v. Jhagra (1), and further appeal 21 of 1908, *Sher Singh v. Gobind Sahai* (2), cited for the appellants, do not help them.

In the former case there was a trust, which does not exist here, the contention that there was a trust because the mother who alienated was a trustee, being hopeless; in the latter case the Court which passed the decree in the previous suit specifically found that “the defendants have a charge for Rs. 837-8-0 “against the land and the plaintiff must pay this amount “before he can obtain possession of the land.” It has not been contended that the judgment in the previous suit contained such a finding—*Muhammad Shah v. Mahant Sadhu Ram* (3) is against the respondents. The question of the applicability of the ruling—*Shibbu Mal v. Paira Singh* (4) followed recently by a Full Bench in *Dhanpat Mal v. Jhaggar Singh* (5)—must therefore be answered in the negative.

Ram Singh v. Nodh Singh (6) is directly in point, the facts being practically on all fours with those before us. It held that where a plaintiff had sued for possession of ancestral land in the hands of the defendant and obtained a decree for possession, conditional on payment of money to the defendant, he was not by such decree debarred from maintaining a second suit for possession, after expiry of the period prescribed for execution of the decree.

In *Deva Singh v. Harnam Singh* (7) it was held that a conditional decree did not in itself constitute a cause of action and that the decree-holder must fall back on his original cause of action. In this exposition of the law we concur.

The result is that this suit is barred by limitation, being governed either by article 144 of the Limitation Act, as held in *Ramansar Pandey v. Raghubar Joti* (8) or by article 142, as

(1) 10 P. R., 1888.

(2) 30 P. W. R., 1909.

(3) 137 P. R., 1889.

(4) 86 P. R. 1877.

(5) 93 P. R. 1908 F. B.

(6) 93 P. R., 1879, F. B.

(7) 57 P. R., 1883.

(8) I. L. R., V All., 493.

held in *Dina v. Dana*, (1) unless it was filed within 12 years of the cause of action or some extended period. We see no reason for not holding that article 142 applies. The suit was filed in May 1907, and it was admitted that the purchaser from the mother of the minors, now plaintiffs-appellants, obtained possession in 1887.

But for the minority the suit would therefore have been barred by limitation if filed after 1899.

The contention of counsel for the appellants, that possession against a minor does not become adverse until he attains majority is hopeless and unsupported by the authorities cited by counsel, Civil Appeal 138 of 1899; *Gajeshri Prasad v. Dharam Dat* (2), *Sheo Sahai v. Muhammad Askari* (3), *Kamakshi Nayakan v. Ramasain Nayakan* (4).

In the third case, indeed, the decision was based on the fact that the plaintiff, a minor at the date of the alienation, filed his suit within 12 years of that date and that it was therefore immaterial that he attained majority more than three years before suit.

The contention for the other side had been that the effect of section 7 of the Act was to force the plaintiff into Court within three years of attaining majority. Authorities on the effect of articles 44 and 91 of the Act are inapplicable, the question for consideration here being whether the suit must not fail under the 12 years rule.

The only provision of the law which can help the appellants is section 7 of the Act, as we are satisfied that the cause of action arose in 1887, the date of dispossession and commencement of adverse possession, and was not affected by the fact that the appellants were then minors. The youngest of the appellants admittedly attained majority in 1901 at the age of 18 years, and the period of limitation was consequently extended by section 7 to 1904 only.

The suit was therefore barred by limitation and the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 141 P. R., 1892.

(2) VIII All. W. N., 152.

(3) VIII All. W. N., 256.

(4) VII Mad. L. J., 121.

No. 101.

*Before Hon'ble Mr. Justice Johnstone and Hon'ble
Mr. Justice Shah Din.*

ABDUL GHAFUR,—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT MEHAR-UN-NISA AND OTHERS,—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 374 of 1908.

Specific Relief Act I of 1877, section 42, proviso—land in possession of tenants—further relief—discretionary powers of Court to allow amendment of plaint.

Held, that the fact that the land in dispute is in possession of tenants, who hold under defendants, in no way entitles the plaintiff, who is out of possession, to bring a declaratory suit. In such a case plaintiff is able to seek further relief than a mere declaration of title within the purview of section 42 of the Specific Relief Act, 1877.

Held also, where the Courts below have refused to exercise in favour of the plaintiff their discretion to allow an amendment of the plaint after a very full consideration of the circumstances of the case, and the consequences of such refusal are in no way serious, the Chief Court should not interfere with that discretion, where it was not exercised arbitrarily or without the Courts knowing all the facts of the case and applying their minds to them.

Further appeal from the decree of Major B. O. Roe, Additional Divisional Judge, Ambala Division, dated the 27th January 1908.

Dwarka Das, for appellant.

K. C. Chatterji, for Mussammat Mehar-un-Nisa.

Sunder Das, for Basant Singh.

The judgment of the Court was delivered by—

12th May 1909.

SHAH DIN, J.—The facts of this case are fully set out in the judgments of the Courts below, and it is unnecessary to restate them. The plaintiff came into Court upon the allegation that he was in possession of the land in suit and prayed for a decree declaratory of his title. The defendant Mussammat Mehar-un-Nisa, who is entered in the revenue papers as owner and occupier of the land, and Basant Singh, who holds a mortgage with possession of 30 bighas from Mussammat Mehar-un-Nisa, pleaded that the plaintiff was not in possession of it as alleged, and that therefore he was not entitled to bring a suit for a declaration of title under section 42 of the Specific Relief Act. An issue was framed by the first Court upon this point, and the

parties produced their respective evidence. The Court held (after certain review proceedings into which it is unnecessary at this stage to enter) that the plaintiff was not, as alleged by him, in possession of the land in dispute at the time of the institution of the suit, and upon that finding dismissed the suit as unmaintainable. The prayer of the plaintiff that in case it was found that he was out of possession he may be permitted to amend his plaint by adding a clause asking for recovery of possession, was disallowed.

The plaintiff appealed to the Divisional Judge urging again that he was as a matter of fact in possession of the land at the date of suit and that he was therefore entitled to a mere declaration of title; and he repeated his prayer for being allowed to amend the plaint in the event of the finding upon the question of possession being against him. The learned Divisional Judge agreed with the first Court in holding that the plaintiff was out of possession of the land in dispute and that he could not maintain the suit as laid. The prayer for amendment of the plaint was also disallowed and the appeal was dismissed.

In appeal the plaintiff's pleader has contended before us :

(1) that the plaintiff was in actual possession of the land at the date of suit ;

(2) that in any case, the land being in the possession of tenants and not in the possession of the defendants (especially Mussammat Mehar-un-Nisa) a suit for a mere declaration of title could be brought by the plaintiff ; and

(3) that in the circumstances of the case, the plaintiff had good reason for believing that he was in possession of the land through tenants, who had attorned to him, and that when it was found (as the lower Courts substantially find) that he was mistaken in that belief, permission should have been granted to him to amend his plaint by adding a prayer for recovery of possession.

We think that none of these contentions can be allowed to prevail.

Upon the first point, after examining the record, we see no reason at all for differing from the concurrent finding of the Courts below that the plaintiff was not in possession of the land in dispute at the date of suit and we overrule the first contention.

The second contention is equally untenable. We hold it unproved that the tenants who actually cultivated the land attorned to the plaintiff; and that being the case, we fail to see how it can be argued that as the defendants were not in actual physical possession of the land, that therefore the plaintiff, who as we have held had no semblance of possession himself, is entitled to maintain a suit for a mere declaration without asking for further relief, under section 42 of the Specific Relief Act. *Channan Mal v. Varadara Julu* ⁽¹⁾ which has been relied on for the plaintiff is not in point. In that case, as will appear from the statement of the facts on pages 308-309 of the report, the plaintiffs were admittedly in possession of at least a portion of the property in suit, and it was not found that the defendant was in possession of any portion thereof. Though it was doubtful whether all the *raiyats* had attorned to the plaintiffs, some at least did acknowledge their title as landlords and held under them. The learned Judges said: "Such a case is eminently one in which a declaratory decree is desirable to avoid multiplicity of suit and obtain a decision once and for all which shall secure peaceful possession of the property." It is obvious, from what we have said above, that the facts of the present case are very different from those that led to the above decision, and therefore the principle of that case cannot be applied to this. On the other hand, we think that the observations made by the learned Judges of the same High Court in *Suryanarayana Murti v. Tammanna* ⁽²⁾ are more apposite to the circumstances of this litigation, and we therefore hold that the fact that the land in dispute is in possession of the tenants, who, it seems to us, hold under Mussammat Mehar-un-Nisa, in no way entitles the plaintiff, who is out of possession to bring a declaratory suit. He certainly is "able to seek further relief than a mere declaration of title" within the purview of section 42 of Act I of 1877.

As regards the third contention, the facts of *Mussammat Bibi Hukam Kaur v. Sardar Asa Singh* ⁽³⁾ upon which reliance is placed, were very special, and we do not think that it would be right to grant to the present plaintiff the indulgence that was extended to the plaintiff in that case. Both the Courts below have after a very full consideration of the circumstances of the case, refused to exercise in favour of the plaintiff their discre-

⁽¹⁾ *I. L. R. XV Mad.*, 307.

⁽²⁾ *I. L. R., XXV Mad.*, 504.

⁽³⁾ *1 P. R.*, 1900.

tion to allow an amendment of the plaint, and as the consequences of that refusal are in no way serious (beyond putting the plaintiff to the necessity of bringing a fresh suit for possession on payment of fresh Court fee, which will not be a very large amount), we can see no valid ground for interfering with that discretion. It is not urged that the discretion was exercised by the lower Courts arbitrarily or without their knowing all the facts of the case and applying their minds to them—*Jaipal Kunwar v. Indar Bahadur Singh* (1).

On the other hand the plaintiff has throughout this litigation *persisted* in his allegation that he held possession at the date of suit, and when that allegation is found to be incorrect, he asks that he may be permitted to amend his plaint by adding a prayer for possession. In these circumstances it will be obviously unfair to the other side to accede to such a request.

We maintain the decree of the lower Appellate Court and dismiss this appeal with costs throughout.

Appeal dismissed.

No. 102.

*Before Hon'ble Mr. Justice Johnstone and Hon'ble Mr.
Justice Shah Din.*

KALU AND OTHERS,—(PLAINTIFFS)—APPELLANTS,

Versus

MUSSAMMAT KAKO AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 349 of 1908.

Custom—Alienation—land originally gifted to son-in-law for benefit of daughter and her issue, reverts to donor's family—reversioners of son-in-law have no locus standi to contest an alienation of it.

The land in dispute originally belonged to one Jiwan, who gifted it to his son-in-law Mulayam for the benefit of his daughter and her son Pira. Pira died leaving a daughter Mussammat Kako and in his life time made a gift of the said land to Maula Bukhsh, Mussammat Kako's son. After Pira's death the daughter sold the land to collaterals of the said Jiwan. Plaintiffs, the collaterals of Pira, brought the present suit to contest the alienation claiming to be reversioners. An objection as to their *locus standi* was raised by the defendants—

(1) *I. L. R., XXVI All., 238 P. C.*

Held, that the land came to Pira through his mother, that is, he held it as a daughter's son. He does not constitute a fresh stock of descent *qua* the land, which throughout its course of devolution, whether by inheritance or gift, retains its original character as property that has gone down from Jiwan to Mussammat Kako, therefore the plaintiffs as collaterals of Pira have no *locus standi* to contest the sale in the presence of the collaterals of Jiwan.

Further appeal from the decree of Major B. O. Roe, Additional Divisional Judge, Ambala Division, dated the 3rd February 1908.

Shah Nawaz, for appellant.

Kamal-ud-din, for respondent.

The judgment of the Court was delivered by—

17th May 1909.

SHAH DIN, J.—The facts of this case are stated at great length in the judgments of the Courts below, and it is unnecessary to recapitulate them here. The two pedigree-tables attached to the judgment of the Divisional Judge and which will be transcribed as appendices A and B to this judgment, have been admitted by both sides as substantially correct, and they are sufficient to show the relationship between the parties' families, so far as it is necessary to trace that relationship for the purposes of the present case.

The question for decision is whether the plaintiffs, who are descended from Shankarya and who are the collaterals of Pira, the great-grandfather on the mother's side of Mussammat Kako, defendant No. 1, whose guardian has sold the land in suit, by deed, dated the 17th December 1906, in favour of defendants Nos. 2 and 3, who are the collaterals of Jiwan, maternal grandfather of Pira, have a right to contest the sale aforesaid on the ground of want of consideration and legal necessity.

The first Court has held that the plaintiffs have the necessary *locus standi* to contest the alienation in question, and having found that it was without consideration and necessity, it has granted the decree prayed for.

The Divisional Judge has held, on the other hand, that the plaintiffs are not the collaterals of Maula Bakhsh, father of Mussammat Kako, *qua* the land in dispute, and that they have therefore no *locus standi* to question the sale. He has upon that ground dismissed the suit.

After hearing arguments at some length, we think that the Divisional Judge's view is sound, and that his decree

must be upheld. Both the Courts below have found that the land in suit originally belonged to Jiwan (whose collaterals defendants Nos. 2 and 3 are), that from Jiwan it passed to his daughter's son Pira through Mulayam (Pira's father) to whom it had probably been gifted by Jiwan; that Pira in his turn gifted it to his daughter's son Maula Bakhsh; and that from Maula Bakhsh it has descended to his daughter Mussammat Kako, defendant No. 1. This being the history of the devolution of the land in question, we do not think that the present plaintiffs, descendants of Qaim and Ganwar, sons of Shankarya, have any *locus standi* to contest the sale in dispute, which has been made in favour of defendants Nos. 2 and 3, the agnates of Jiwan. When Jiwan gifted the land to Mulayam who was his son-in-law and (as the first Court thinks) probably a khana-damad, the gift was one made for the benefit of Jiwan's daughter and her issue, i.e., for the benefit of Pira [*Nawab Khan v. Kallu Khan* (1)], and it is clear that if Pira had died without issue, the land would have reverted to Jiwan's collaterals—*Sita Ram v. Raja Ram* (2), *Gurditta v. Atar Singh* (3). Pira, however, did leave issue in the person of a daughter, and the gift made by him to his daughter's son, Maula Bakhsh, must be regarded as an act accelerating the succession of Maula Bakhsh. If the latter had died without issue the land would have reverted not to Pira's collaterals (as it was not his self-acquired property) but through Pira to the collaterals of Jiwan, who was the original owner of it and who had gifted it to Mulayam for the benefit of Pira. The principle applicable to this case is the one laid down in *Mussammat Emna Begam v. Jawad Ali* (4) (not cited by either side) where at page 565, Roe, J., says: "The estate came to 'Sajjad Ali through his mother, that is, he held it as a 'daughter's son. The presumption is that on his death without 'issue, the estate passes not to his male collaterals, commencing with his father, but to the male collaterals of his 'mother's father." Applying this principle in the present case, it is clear that Pira does not constitute a fresh stock of descent *qua* the land in question, but that throughout its course of devolution, whether by inheritance or gift, it retains its original character as property that has come down from Jiwan to Mussammat Kako. That being so, the plaintiffs, as collaterals of Pira, have no *locus standi* to contest the sale in

(1) 39 P. R., 1905.

(2) 12 P. R., 1892, F. B.

(3) 117 P. R., 1906.

(4) 144 P. R., 1893.

dispute in the presence of the collaterals of Jiwan, some of whom are themselves the vendees (*Nawab Khan v. Kallu Khan* ⁽¹⁾).

As regards the house, which has been sold together with the land, no ground of differentiation between the two kinds of property was ever suggested in the Court below, nor has it been shown in this Court that whereas the land was gifted by Jiwan to Mulayam, the house was acquired either by Mulayam or by Pira. In the absence of such evidence, the house must go with the land and cannot be treated on a separate footing from it. It is quite possible that the house was built by Maula Bakhsh himself, and if that be so, the plaintiffs who are not the collaterals of Maula Bakhsh have no *locus standi* at all to contest the sale of the house.

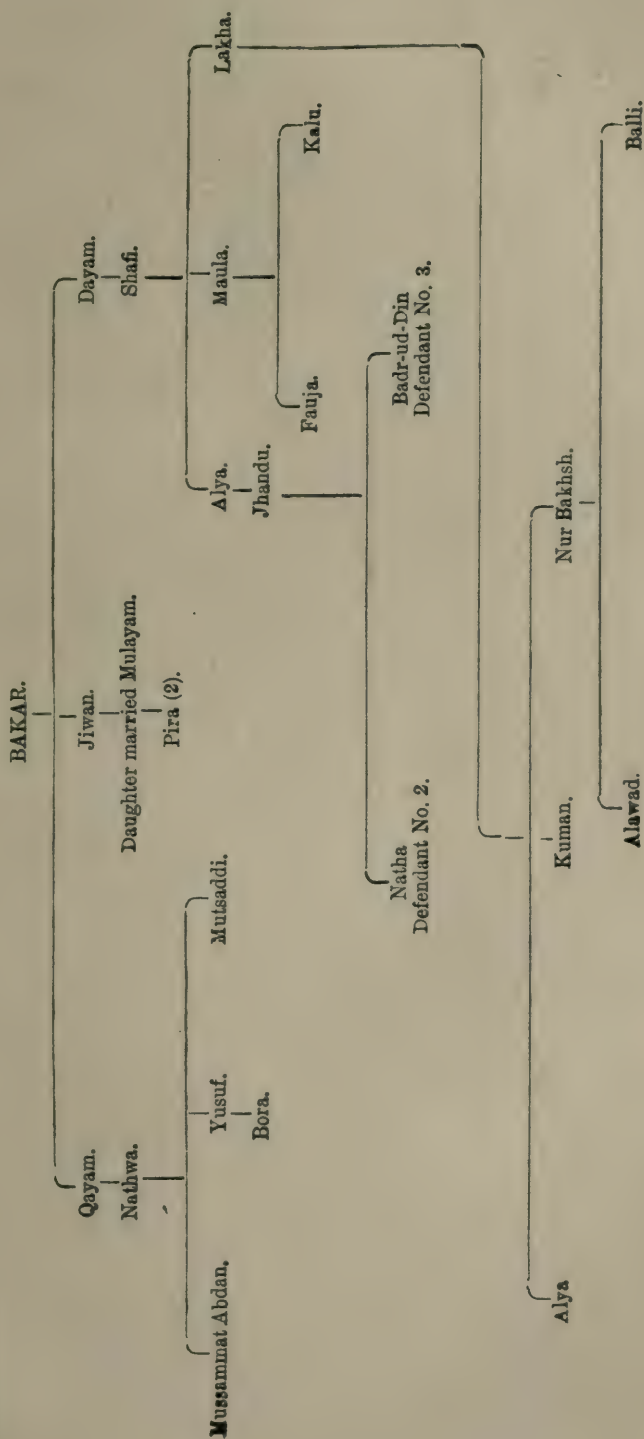
We maintain the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(¹) 39 P. R., 1905.

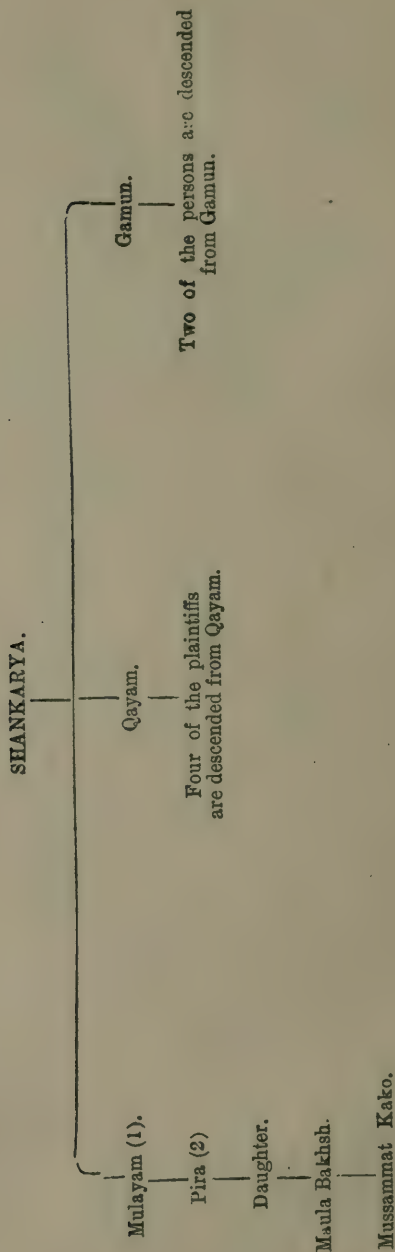
APPENDIX A.

Defendants.



APPENDIX B.

Plaintiffs.



No. 103.

*Before Hon'ble Mr. Justice Johnstone and Hon'ble
Mr. Justice Shah Din.*

DIAL SINGH AND OTHERS—(DEFENDANTS)—APPELLANTS,

Versus

SEWA SINGH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1027 of 1908.

Custom—Succession—Collateral succession of adopted son— Sikh Jats of mouza Chuhar Chak, tahsil Moga, district Ferozepore.

Held, that among Sikh Jats of mouza Chuhar Chak in the Moga tahsil of the Ferozepore district, an adopted son, who is of the same gôt as the adoptive father, is entitled by custom to succeed collaterally in the family of his adoptive father.

Further appeal from the decree of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated the 24th June 1907.

Gouldsbury, for appellants.

Oertel, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.—The question for decision in this appeal is whether among *Sikh Jats* of *mouza Chuhar Chak* in the *Megha tahsil* of the *Ferozepore* district, an adopted son, who is of the same *gôt* as the adoptive father, is entitled by custom to succeed collaterally in the family of his adoptive father. The pedigree-table, which is printed at page 5 of the paper-book, shows that the plaintiff is the natural son of *Gian Singh* and the adopted son of *Mahtab Singh*. *Mahtab Singh* meets the common ancestor, *Baga*, in the third degree, while *Gian Singh* meets him in the fourth degree. Both *Mahtab Singh* and *Gian Singh* are dead, and it is not disputed that while the plaintiff has succeeded to the property left by *Mahtab Singh*, he has not succeeded to the property left by his natural father, *Gian Singh*. The property which is in dispute in the present litigation has been left by *Rai Singh*, a nephew of *Mahtab Singh*, who died in 1895, and the record shows that mutation in respect of one-third share of *Rai Singh's* land has taken place, since his death, in the name of the plaintiff, as though he was the natural son of *Mahtab Singh*. The defendants, who are sons of the collaterals of *Rai Singh*, have, however, refused to deliver possession of the land to the plaintiff, denying his right of collateral succession in the family of *Mahtab Singh*. Hence the suit out of which this appeal has arisen.

19th May 1909.

Both the Courts below have held that under the custom applicable to the parties, the plaintiff is entitled to succeed collaterally to the land left by Rai Singh, and have, accordingly, decreed his claim. The learned Divisional Judge, seeing that the case involved an important question of custom, remanded it for full enquiry into the point raised, and it was, after the parties had had ample opportunity to produce all the available evidence bearing on the case that he decided the appeal, coming to the same conclusion as the Court of first instance had done.

We have heard counsel on both sides and have carefully examined the record and the judicial decisions relied upon by them, and we think that the concurrent decision of the Courts below is correct and must be maintained. The *riwaj-i-am* of the Moga *tahsil* is clearly in favour of the plaintiff, in so far as it shows that among the tribes that are governed by it, the adopted son is transplanted into the adoptive father's family, being debarred from inheriting in the family of his natural father, and that for purposes of collateral succession he occupies the same position as the natural son of the adoptive father would have occupied. The relevant clause as given at page 21 of the Customary Law of the Moga *tahsil* runs as follows :—

“ A son adopted into another family cannot inherit from his natural father excepting, of course, so far as his adoptive father could himself have inherited from the natural father.”

The learned counsel for the appellants has contended that this clause is too vague to be of any value, and further that the words “ a son adopted into another family ” indicate that the clause in question only applies to cases where there has been a strictly formal adoption according to Hindu Law, involving the transplantation of the adopted son from his natural father's family into that of his adoptive father, and not to cases in which there has been merely the customary appointment of an heir, which (the learned counsel maintained) only gives rise to a personal relation between the adoptive father and the adopted son. We think that the words relied upon do not bear the interpretation sought to be placed on them, as we find on referring to the original clause in the vernacular that the words actually used are *pisr mutbanna* (adopted son), which have been translated as “ a son adopted into another family.” But the translation seems to bring out effectually the intention underlying the answer to the question put on the subject, as the whole tenor of the clause under consideration shows that

for purposes of succession the adopted son, though his adoption may be in the nature of appointment of an heir, is transferred into the family of the adoptive father. We also find by reference to the answer recorded at the top of page 21 of the Customary Law above alluded to that certain formalities are always observed among *Hindu Jats* on the occasion of an adoption, thus showing that among these people adoption does partake more or less of the nature of a *quasi* religious ceremony. In the present case the plaintiff's adoption, no doubt, is not alleged to have been a strictly formal adoption according to Hindu Law, but there is nothing to show that the customary formalities prescribed in the *riwaj-i-am* were not observed in his case; and when we find that no suggestion has at all been made in this litigation as to the plaintiff's adoption being in any way defective, we may well presume that those formalities were duly complied with. It is not denied that the plaintiff has not inherited from his natural father, but it is urged that the plaintiff may have willingly given up his share in his father's property, and that this does not amount to exclusion from inheritance. But this contention is hardly tenable in the face of the entry in the *riwaj-i-am*, which clearly shows that the adopted son has no option in the matter, and that he is by custom debarred, irrespective of his consent, from inheriting in his natural father's family in his capacity as his natural son. This being so, it would seem to follow that the adopted son would have the right of collateral succession in his adoptive family in the same manner and to the same extent as the natural son of the adoptive father would have had. And this is precisely what the *riwaj-i-am* lays down. The *riwaj-i-am* in question appears to have been followed in practice in this very village on more than one occasion, as will be seen by reference to the mutation orders marked as Exhibits P. 3 and P. 4, though their value as precedents is somewhat discounted by the fact that the adoptions evidenced by them are at present the subject of litigation. The case of Sucha Singh (mutation order, dated July, 1894, Exhibit P. 6) is, however, directly in point. It is a case of this *tahsil*, and the adopted son succeeded collaterally. We also find that so far back as 1893, Waryam Singh and Uttam Singh, *Gil Jats* of this *tahsil*, were allowed to sue along with their adoptive father's collaterals for property to which they were entitled to succeed collaterally, and they were finally successful in this Court. *Waryam Singh v. Man Singh* (1). Further, we have the instance

(1) 72 P. R., 1893.

of Kaku Singh (Ex. P. D.), who having been adopted, was excluded from his natural father's inheritance as the result of litigation in Court.

All these instances go to show that the entry in the *riwaj-i-am*, on which the plaintiff relies, has been acted upon in practice; and it must, therefore, be regarded as a correct and valuable record of custom. The defendants, on the other hand, have not cited a single instance, either of a private mutation or of a judicial decision, in which the adopted son's right of collateral succession among *Sikh Jats* in the Moga *tahsil* has ever been questioned, nor have they been able to produce in Court any prominent members of their tribe to depose to such collateral succession being opposed to custom. The plaintiff has, therefore, established a strong *prima facie* case, which the defendants have not made the slightest attempt to rebut, even the Revenue officers being unable, as shown by mutation proceedings, to support their view of the custom. The learned counsel for the appellants strongly relies on *Ram Ditta v. Takht Mal* ⁽¹⁾ in support of his position that the plaintiff in this case has no right of collateral succession. That decision, however, to which one of us was a party, proceeds upon the evidence produced in that case, the weight of which was clearly against the alleged right of collateral succession set up by the adopted son; and the ruling must, for obvious reasons, be limited to *Chima Jats* of the Daska *tahsil* of the Sialkot district, and cannot be extended to the present case in which there is cogent evidence of an unimpeachable character in support of the plaintiff's claim. It will be observed that the *riwaj-i-am* of the Sialkot district, which was relied upon in that case, was different in its terms and effect as a rule of custom from the one which governs the parties to this litigation (see Customary Law of the Sialkot District, pages 23-24).

For the foregoing reasons we hold that the plaintiff in this case has proved that he has the right of collateral succession in the family of his adoptive father, and maintaining the decree of the lower Appellate Court, we dismiss this appeal with costs.

Appeal dismissed.

(1) 50 P. R., 1908.

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Sir William Clark, Kt., Chief Judge and Mr. Justice Reid.

HALE,—PETITIONER,

Versus

KING-EMPEROR,—RESPONDENT.

Criminal Revision No. 1607 of 1907.

} REVISION SIDE.

*Judgment of single Judge exercising original criminal jurisdiction—
Appeal—Revision—Criminal Procedure Code, 1898, Sections 339, 434,
439.*

Held, that the Chief Court has no power to revise either on appeal or revision the judgment of a single Judge exercising original criminal jurisdiction.

Petition for revision of the order of the Hon'ble Mr. Justice Reid, Judge, Chief Court, Punjab, dated 12th July 1907.

Fazl Hussain, for petitioner.

Government Advocate, for respondent.

The judgment of the Court was delivered by

CLARK, C. J.—The Hon'ble Mr. Justice Reid, in the exercise 30th Octr. 1907 of his original criminal jurisdiction, at a trial held with a Jury, convicted a European British subject under Sections 436—109 and 420—511, Indian Penal Code, and sentenced him on each charge to two and-a-half years' rigorous imprisonment, sentences to run concurrently.

The convict has filed an appeal in this Court, and has asked that if no appeal lies that his application should be treated as a revision under Section 439, Criminal Procedure Code.

At the preliminary hearing in Chambers it was admitted that no appeal lay, and the question whether a revision lay was referred to a Bench, and is now before us for decision.

Mr. Fazl Hussain has argued the point before us and quoted the authorities, and has frankly admitted that they are against him.

The authorities quoted are: *In the matter of Abdul Sobhan* ⁽¹⁾; *In the matter of Gibbons* ⁽²⁾; *Queen-Empress v. Fox* ⁽³⁾; and *Emperor v. Kalu* ⁽⁴⁾.

The subject may be regarded from two points of view: (1), whether a Division Bench or a Full Bench can revise the judgment of a single Judge exercising original criminal Jurisdiction?

(2), whether a Judge himself can revise his own judgment?

As regards the first point, the powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court, and cannot be in any way controlled by a Bench or Full Bench of the Court. As no appeal lies, so no revision lies. Both procedures imply subordination or inferiority, which does not exist.

The occurrence of the words "inferior Criminal Court" in Section 435, Criminal Procedure Code, and their omission in Section 439, Criminal Procedure Code, is due to the fact that all other Courts are inferior to the High Court, and the word is therefore unnecessary in Section 439, Criminal Procedure Code, it does not imply that one branch of the High Court is to revise the proceedings of another branch.

As regards the second point, Section 434 (1), Criminal Procedure Code, provides a procedure for reserving points of law by a single Judge for consideration by a Bench, and there is also a right of appeal to the Privy Council.

Great stress is laid upon Section 369, Criminal Procedure Code, and on the words "other than a High Court" used in that section. This point was carefully considered in the case of *Gibbons* ⁽²⁾, and we agree with the view there taken.

Stress was also laid on clause 4 of Section 439, and the reference to Section 273 in that clause. This point was cleared up by Mr. Justice Mitter in the same ruling.

We are of opinion that a Judge cannot revise his own decision. The revision is therefore dismissed.

Application dismissed.

⁽¹⁾ I. L. R., VIII Cal., 63.

⁽²⁾ I. L. R., XIV Cal., 42.

⁽³⁾ I. L. R., X Bom., 176.

⁽⁴⁾ I. L. R., XXVII All., 92.

No. 2.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

BADAN SINGH,—APPELLANT,

Versus

KING-EMPEROR,—RESPONDENT.

APPELLATE SIDE.

Criminal Appeal No. 548 of 1908.

Confession—Confession made to a Magistrate of a Native State and written down by his reader—Admissibility of—Criminal Procedure Code, 1898, Sections 164, 364, 533—Evidence Act, 1872, Section 26.

Held, that in the absence of any inference of prejudice a confession made to a Magistrate of a Native State which was duly recorded in every other respect does not become inadmissible against the maker merely because it was written down by the reader of the Magistrate.

Although the terms of Sections 164 and 364, Criminal Procedure Code, are to be strictly observed, such a defect can be cured by examining the Magistrate as provided for in Section 533.

Appeal from the order of W. A. Le Rossignol, Esquire, Sessions Judge, Amritsar Division, dated 27th August 1908.

Morrison, for appellant.

Government Advocate, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—The appellant, Badan Singh, a resident of Mauza Mandahar in the Faridkot State, has been convicted by the Sessions Judge of the Amritsar Division, agreeing with the unanimous opinion of the assessors, of the murder of one Khiwan Singh, an old man of over 60 years of age. The murder is alleged to have been committed on or about the 5th November 1907, and the deceased Khiwan Singh was the cousin of the accused. The accused is a young Jat of 28 years of age, and as he has been sentenced to death, the case comes before us, not only on his appeal, but also under Section 374 of the Criminal Procedure Code. 9th Novr. 1908.

The facts which we take to be established upon the evidence before us are as follows :—

- (1) Some four or five days before the *Dasahra* 1907, the accused and the deceased had left the village of Muri Man with five head of cattle of somewhat exceptional quality and the object which the deceased had in view was to obtain prizes for these animals at various local fairs. The evidence upon this point consists of the statements of

Jiwan Singh (P. W. 2) the brother of the deceased ; Waryam Singh (P. W. 3) and Rajada (P. W. 4). These witnesses depose to the facts that Khiwan Singh and the accused went off with the cattle together, and that neither returned to Mari Man ;

(2) Dewa Singh (P. W. 5) and Charagh Shah (P. W. 6) depose to the fact that on or about the night of *Diwali* 1907, they saw the accused (whom they identify) with two other persons at Jandiala ; they further identified the corpse found in the pond on the 6th November as that of one of the three persons whom they saw the previous evening. Dewa Singh's evidence is to the effect that on the evening previous to the *Diwali* he had seen three men in the *takia* under a *bor* tree, that they had five head of cattle with them and said that they had come from Phul Mehraj (a group of villages which includes Mauza Mari Man) with the object of getting prizes at the fair and that he identified the deceased and the accused as two of the three men. This evidence is substantially corroborated by that of the witness Charagh Shah (P. W. 6).

(3) Hukam Singh (P. W. 17) and Karm Singh (P. W. 18) who are related to accused and belong to his village, state that some 8 or 9 days after *Diwali*, accused arrived at the village with the cattle of Jiwan and Khiwan and that he informed them that Khiwan had died, at Jandiala ; that he (the accused) was taking the cattle to Mari Man and that he intended to return and take the ashes of the deceased to Hardwar. The accused never returned to the village, nor did he take the cattle to Mauza Mari Man.

(4) Two witnesses, Kala Singh, son of Hira Singh (P. W. 9) and Kala Singh, son of Sobha Singh (P. W. 10) depose that they are residents of Mauza Bhaini, which is situate one mile from Mauza Mari Man ; that they knew the cattle of Jiwan and Khiwan ; that they happened to be at the Amritsar cattle fair at *Diwali* 1907, and there recognised the cattle which were in

the possession of one who called himself Harnama that later on the accused came up and in answer to inquiries stated that Jiwan and Khiwan were ill at Mauza Mari Man.

- (5) On the 6th November 1907, the body of an old man was found in a pond at Jandiala, and was subsequently identified by the witness Dewa Singh (P. W. 5) as that of one of the three men whom he had seen with the cattle the previous evening. He at once informed the police that these men had said that they came from Phul Mehraj, some 80 miles distant, and this gave the police a clue upon which they forthwith set to work.

According to the medical evidence, it is beyond all doubt that the deceased was strangled to death prior to his body being thrown into the water.

- (6) Acting upon the clue given to them by Dewa Singh, the police made inquiries at Phul Mehraj. There they heard that the deceased, Khiwan, had started off in company with the accused who was a resident of Mandahar in the Faridkot State. They therefrom proceeded to the latter village and found that the accused had been there with certain cattle, but that he had since disappeared.
- (7) On the 13th March (*i.e.*, after about 4 months from the date of the finding of the corpse) the accused was arrested by the Patiala Police at Bhatinda, on information supplied by one Anokh Singh, *baniah*, who had heard that a reward was offered for his capture.
- (8) The accused was taken by the Patiala Police on the next day (*i.e.*, the 14th March) to Lala Shankar Lal, a Magistrate of the Patiala State, and made a detailed confession in which he admitted having killed Khiwan with the assistance of one Harnama. This statement was taken down, according to Lala Shankar Lal, who gave evidence upon the point before the committing Magistrate, by the Magistrate's Munshi, but in the presence of the Magistrate. Lala Shankar Lal explains that the accused made his statement in "*Jangli*"

but adds that the Munshi put it down in *Urdu*, the whole statement being subsequently read out and explained to the accused. The thumb-mark of the accused was taken on the document so prepared and the Magistrate added a certificate signed by himself to the effect that the confession was made in his presence, was read over to the accused, and admitted by him to be correct; that he (the Magistrate) believed it to be made voluntarily and that no police were present when it was made and that the accused's handcuffs were taken off when he was making the statement. The Magistrate (Lala Shankar Lal) was called as a witness before the committing Magistrate and deposed to the above effect.

This confession has been retracted and the accused asserts that he made no statement at all before Lala Shankar Lal. He states that he was drugged and that the Munshi took down merely what the Police stated.

Such then is the evidence in the case, and naturally the learned counsel for the accused has in the first place endeavoured to have this confession ruled out of Court, for (as he admits) if it be accepted as admissible, there can be no question that the accused's guilt is established. In that event the confession read with the other evidence to which we have referred, can leave no doubt that the accused killed Khiwan and that the body discovered in the pond at Jandi-ala is that of Khiwan. The question then is whether this confession is admissible in evidence? We may at once clear the ground by saying that we do not for one moment believe that the accused did not make the statements substantially in the form recorded. There is nothing whatever on the file or in the police papers to suggest that the Patiala Police on the 14th March 1908, had any knowledge of accused's actions and movements in November 1907, and they certainly knew nothing of the sale of the white cow at Amritsar for Rs. 15 to a Brahmin at the *Diwali* fair. In this particular the confession of the accused has been found to be fully borne out by the entry in the Municipal Sale Registers of the *Diwali* fair of 1907. In our opinion, the accused actually made the statements recorded by the Magistrate's Munshi in the Magistrate's presence.

On the other hand it may be conceded that the confession was not recorded in exact compliance with the provisions of

Sections 164 and 364 of the Criminal Procedure Code, inasmuch as it was not actually taken down by the Magistrate himself. But we think this irregularity is fully covered by Section 533 of the Code, and as the Magistrate has deposed that the confession was taken down in his presence, that the accused made that confession and that he subsequently acknowledged that it correctly represented what he had said, we feel that we must accept it as a genuine record of what took place. A confession made to a Magistrate in a Native State is admissible in evidence in a trial in British India if it is duly recorded in proceedings under, and in the manner required by the Code of Criminal Procedure (No. 8 P. R., 1907, Criminal). This being so the confession is none the less admissible merely because the provisions of the Code have not been in every respect strictly observed provided that the accused has not thereby been prejudiced on the merits of the case, and the fact that the accused made the statement is proved by evidence (Section 533 of the Code). In this case we have the evidence of Lala Shankar Lal, that the statement was so made by the accused, and we cannot see how the accused has in any wise been injured as to his defence on the merits because the statement was actually written not by the Magistrate himself but by the Munshi. It was taken in the immediate presence of the Magistrate, was signed by the latter and was certified by him to have been read over and explained to the accused.

We are quite willing to admit that a confession so recorded is not entitled to the same weight as a confession recorded by a British Magistrate in strict compliance with the terms of the Code, and we should certainly have hesitated to convict the accused upon the confession before us, had it stood alone. But the case against the accused does not by any means rest merely on that confession, though undoubtedly the confession does very materially corroborate the other evidence. It is proved beyond all possible doubt that accused started off with Khiwan and the cattle from Mari Man, that he was seen on the 5th November at Jandiala with a person whose dead body was discovered in a pond at Jandiala on the 6th November; that he admitted to his own relatives that Khiwan had died in his presence and in his company at Jandiala; and that he was subsequently seen with Khiwan's cattle at Amritsar and gave a false explanation to account for the absence of either Jiwan or Khiwan. We have the further fact that

he absconded and could not be found for some $4\frac{1}{2}$ months after the discovery of Khiwan's body.

Some argument was addressed to us as to the absence of any proof that the body found at Jandiala was that of Khiwan. Possibly some difficulty might have arisen in this respect had not accused himself informed Hukam Singh and Karm Singh that Khiwan had died at Jandiala, and had he not confessed that he (and, as he says, Harnama) had killed Khiwan near that village. As it is, we have no doubt that the corpse found in the pond was that of Khiwan.

Taking all the evidence into consideration, we agree with the Sessions Judge and the assessors that the guilt of the accused has been fully established. It may be, though there is nothing beyond the accused's own statement in support of the theory, that he was assisted in the murder by another man, but whether he had or had not such assistance, it is clear that he took an active part in putting Khiwan to death, the motive being no doubt, to secure the cattle. The accused hoped to be able to satisfy Khiwan's relatives that the old man had died a natural death. This was the story he told to Hukam Singh and Karm Singh. It was at once accepted by them and would probably have been equally accepted by the deceased's brother, had not the body of Khiwan been discovered in the pond.

So far as we can judge, the murder was committed in cold-blood and with premeditation and we can find no ground for interfering with the sentence awarded by the Sessions Judge. We accordingly reject the appeal and confirm the sentence of death.

Appeal dismissed.

No. 3.

Before Mr. Justice Kensington.

GIYAN CHAND,—PETITIONER,

Versus

KING-EMPEROR,—RESPONDENT.

Criminal Revision No. 924 of 1908.

REVISION SIDE.

Extradition Act XV of 1903, Section 7—Surrender of persons charged with offences in Native States—Powers of Magistrate executing warrants issued by a Political Agent.

Held, that a District Magistrate who is addressed with a view to execution of a warrant issued by a Political Agent of a Native State under the

authority of Section 7 (1) of the Indian Extradition Act XV of 1903, must act in pursuance of such warrant and has no authority to ascertain whether a *prima facie* case exists against the accused or not.

Petition for revision of the order of Diwan Narindra

Nath, District Magistrate, Gujrat, dated 2nd July 1908.

Nanak Chand, for petitioner.

The judgment of the learned Judge was as follows :—

KENSINGTON, J.—There is a petition for revision asking the 4th Sept. 1908. Chief Court to interfere in respect of a warrant issued by the Political Agent, Alwar State, under Section 7 of the Extradition Act XV of 1903. The offence alleged against the petitioner who is now resident in Gujrat, is under Section 419, Indian Penal Code, an offence included in the first Schedule to the Act.

The grounds on which interference is asked for are (1), that no *prima facie* case is established against the petitioner, and (2) that the District Magistrate of Gujrat wrongly moved the Political Agent in certain previous proceedings, with a view to issue of the warrant. Both these grounds are untenable.

It is no part of the duty of this Court or of the Gujrat authorities to ascertain whether a *prima facie* case exists against the petitioner. The responsibility rests with the officer by whom the warrant has been issued, namely, the Political Agent. And it is also no part of this Court's duty to go into the circumstances under which the Political Agent was originally moved.

The fact remains that, whatever the antecedent proceedings may have been, the Political Agent has issued a warrant. By Section 7 (1) of the Act the District Magistrate is required to act in pursuance of such warrant, and when he does so his responsibility is at an end.

The petition is rejected. The District Magistrate should now proceed to execute the warrant without delay if he should not already have done so. The preliminary order of this Court, dated 15th July 1908, is discharged.

Application dismissed.

No. 4.

Before Mr. Justice Rattigan and Mr. Justice Shah Din.

REVISION SIDE. {

PRESS,—PETITIONER,

Versus

KING-EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 1589 of 1908.

Revision—Judgment of single Judge with jury exercising original criminal jurisdiction—Criminal Procedure Code, 1898, Section 439.

Held that no application for revision under Section 439 of the Criminal Procedure Code, 1898, lies in a case where the applicant has been convicted and sentenced at a trial held by a single Judge of the Chief Court with the aid of a jury in the exercise of that Court's original criminal jurisdiction.

Application for revision of the order of the Hon'ble Mr. A. H. S Reid, Judge of the Chief Court of the Punjab, dated 19th November 1908.

Grey, for petitioner.

The judgment of the Court was delivered by

11th Jany. 1909.

RATTIGAN, J.—The question before us for determination is whether an application for revision under Section 439 of the Criminal Procedure Code, lies in a case where the applicant has been convicted and sentenced at a trial held by a single Judge of this Court with a jury in the exercise of this Court's original criminal jurisdiction. The grounds upon which this application is based are set forth in detail in the petition for revision, but obviously we are not concerned with them unless and until it can be held that an application of the kind now before us lies in law. A Division Bench of this Court composed of the learned Chief Judge and Reid, J., has, in a similar case, decided this question in the negative (see *Hale v. King-Emperor* ⁽¹⁾), but as the question is one of great importance the learned Chief Judge has referred the present application to an independent Division Bench for further consideration.

Mr. Grey, who appeared in support of the present application, was not one of the counsel who argued the case before the Division Bench above referred to, but cannot find any argument urged by him which was not duly considered by that

(¹) 1 P. R., 1909, Cr.

Bench. He has, indeed, relied on the change of phraseology to be found in Sections 435 and 439 of the Code of 1882, as compared with Sections 294, 295 and 297 of the Code of 1872, but after due consideration, we are unable to discover any radical alteration of the law as it existed prior to and after the enactment of the Code of 1882. No doubt in Section 297 of the Code of 1872 reference was made to Subordinate Courts, and in Section 439 of the Code of 1882 there is no such reference, but we agree with the learned Judges who decided the case of *Hale* that the omission of any such reference is due to the fact that all Courts are inferior to the High Court, and that consequently any such reference was considered wholly unnecessary.

The strongest argument, in our opinion, in support of the applicant's contention rests on clause (4) of Section 439, and there is undoubted force in the argument that that clause would not have been inserted, had not the Legislature intended that a High Court should have power to interfere with other orders or sentences passed by a Judge of that Court. But we think that the correct answer to this argument has been given by Mitter, J., in the matter of the petition of *Gibbons* (1).

As Mr. Grey's other arguments are considered in the previous judgment of this Court, we need say no more than that. We entirely agree with the conclusions arrived at in that judgment.

In our opinion no application, such as that now preferred, lies. To hold otherwise would entail questions of extraordinary difficulty. In the first place, to what authority should such an application be preferred? Is it to be laid before another Judge of the same Court, whose jurisdiction is in every respect concurrent with but not superior to that of the Judge whose order is impugned? That this difficulty exists practically is apparent from the fact that the present application was in the first instance laid before a single Judge of this Court, and rightly so, for Mr. Grey could refer us to no rule or provision of law under which it could, in the first instance, be placed before a Division Bench. But it would obviously be a most extraordinary exercise of jurisdiction for one Judge of this Court to overrule (as apparently under Mr. Grey's arguments he could) an order or sentence of a brother Judge with concurrent jurisdictional powers.

Admittedly there is no authority in support of the applicant's proposition, and the cases referred to in the previous judgment of this Court are, if not directly at least indirectly, against the applicant. The ruling of the Calcutta High Court in the case of Gibbons, though not exactly in point, is especially adverse to the arguments advanced before us.

But when we have to consider the intention of the Legislature as expressed in Section 439 of the Code, we find as a good index to its meaning the view taken by it in subsequent legislation. In 1900 a Chief Court was constituted for Lower Burma by Act VI of 1900 (the Lower Burma Courts Act). This Act is, in general, on the lines of the Punjab Courts Act of 1884, but it includes a Section (12) which does not exist in our Act. This section runs as follows:—

“When in any case any such question as is referred to in Section 11 has been decided by a Judge of the Chief Court exercising the jurisdiction of the Chief Court as a Court having power to try European British subjects committed to it for trial, or as the principal Criminal Court of original jurisdiction for the Rangoon Town, and no reference has been made under the provisions of that section or of Section 434 of the Code of Criminal Procedure, 1898, the Chief Court may, on its being certified by the Government Advocate that in his opinion the decision should be further considered, review the case or such part of it as may be necessary, and finally determine the question, and may thereupon alter the judgment, order or sentence passed by the Judge, and pass such judgment, order or sentence as it thinks right.”

To a precisely similar effect are Section 26 of the Letters Patent of 1865 constituting the High Court of Calcutta, and the various corresponding sections of the Letters Patent of the other High Courts. The clear inference from these provisions is that apart from them the High Court would have no power to interfere with the action of a Judge of that Court who has not reserved a point of law in accordance with Section 434 of the Code.

Legislation cannot reasonably be construed as redundant or unnecessary, but if Section 439 of the Code gives a High Court plenary power to deal with all such matters, the far more restrictive and circumscribed powers conferred by Letters Patent on the High Courts, and by Section 12 of Act VI of 1900 on the Lower Burma Chief Court, would not only

be unnecessary but actually in conflict with the provisions of Section 439. We find it impossible to arrive at a conclusion which would have so anomalous an effect, nor can we hold that this Court has in this respect far greater powers than are possessed by all other High Courts, and this simply because the express powers conferred on the latter by independent legislation have not hitherto been conferred on this Court.

In further confirmation of our views we would refer to the provisions of Section 442 of the Code which clearly imply that the powers of revision possessed by a High Court under Chapter XXXII are exerciseable only in respect of findings, sentences or orders of inferior Courts. We confess we are unable to follow Mr. Grey's explanation that Section 442 deals only with revisions of "cases" and therefore only with trials by Subordinate Courts, leaving untouched those "proceedings" in which a High Court revises findings, sentences or orders of a Court. The section is very generally expressed and deals with every "case" which "is revised under this Chapter by a High Court"; in other words, it applies to all revisions by a High Court whether under Section 435 or Section 439 and the provisions that it must in every such case certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, is, in our opinion, incompatible with the notion that it can revise its own finding, sentence or order under Chapter XXXII, for if it can, it must certify itself of the order so passed by it, a wholly unnecessary proceeding which can hardly have been contemplated. We hold, therefore, that the present application does not lie, but we cannot conclude without expressing the hope that the Legislature will, at a convenient date, confer upon this Court powers similar to those possessed by the High Courts and the Lower Burma Chief Court. With regard to the merits of the present application we say nothing as we have not considered them, but we think that it is very desirable that this Court should have the power under certain circumstances to deal with matters of law decided by a single Judge in the exercise of the Criminal Original Jurisdiction possessed by it when no reference has been made by that Judge under either Section 11 of the Punjab Courts Act or Section 434 of the Criminal Procedure Code.

REID, C. J.—I endorse the recommendations that the Punjab Courts Act be amended by adding the provision contained in Section 12 of the Lower Burma Courts Act.

14th Jany. 1909.

Application dismissed.

No. 5.

Before Mr. Justice Reid, Chief Judge.

THE CROWN,—COMPLAINANT,

Versus

BHAWANI DAS,—ACCUSED.

Criminal Revision No. 1502 of 1908.

Newspaper—Not printing name of printer and publisher—Offences under Sections 3 and 12.

Held, that the object of the rule contained in Section 3, Act XXV of 1867, is that a paper printed should clearly intimate who is liable as printer and who is liable as publisher, and that the words "ba ihtimam Ram Saran Dutt printer, Hindustan Steam Press, Lahore" "men, Lala Bhawani Das Manager ke liye chapa" do not contain such intimation as to the publisher.

Held also, that Sections 3 and 12 do not deal with intention. If the rule contained in Section 3 has not been complied with, an offence has been Committed and is punishable under Section 12.

Held further, that printers and publishers cannot be allowed to select for themselves the description to be used in professing to comply with the Act they must use the descriptions prescribed by the Act.

*Case reported by Captain A. A. Irvine, Sessions Judge,
Lahore Division, on 17th November 1908.*

Dwarka Das and Tek Chand, for petitioners.

Government Advocate, for respondent.

The facts of this case are as follows :—

It is alleged that the accused Bhawani Das publisher of the *Arya Gazette*, published the issue of that paper, dated 9th April 1908, without complying with Section 3 of Act XXV of 1867.

The accused on conviction by V. Connolly, Esquire, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced, by order dated, 20th June 1908, under Section 12, Act XXV of 1867, to Rs. 50 fine.

NOTE.—Fine realized.

The proceedings are forwarded for revision on the following grounds :—

This is a petition for revision of the order, dated 20th June 1908, of Mr. Connolly, Magistrate, 1st class, convicting petitioner and fining him Rs. 50 under Section 12 of Act XXV of 1867. The fine has been paid. I may mention at once that the Public Prosecutor in this case asked for only a

REVISION SIDE.

nominal penalty, and the Rs. 50 fine was considered by the Magistrate to constitute such penalty. In my opinion, there is no proper proof of any offence under the Act. Section 3 of the Act lays down that on every paper printed in British India shall be printed legibly—

(1) *Name of the printer* ; (2) *place of printing* ; (3) *name of publisher* ; (4) *place of publication*.

With respect to papers such as the present one. The Act contains no form whatever to show how these matters must be set forth, and I take it that all that is required is, that the information required by Section 3 should be able to be gleaned from the paper. The *Arya Gazette* is apparently the weekly organ of the "Arya Prithinithi Sabha," which is a registered body under the Societies Act, as appears from the title page of the paper. From the evidence on record it seems to me clear enough that the paper shows that it was printed at the "Hindustan Steam Press," Lahore, by Ram Saran Datt, printer, on behalf of petitioner, manager. I think the paper itself shows that the place of publication is Lahore, but the Lower Court has discussed the question whether the omission of the word "publisher" can be rectified by the words "on behalf of the manager." No doubt, under Section 3 there should be the word "publisher", as "manager," and "publisher" need not necessarily be the same. However, I think the real question here is, whether there has been a deliberate infringement? I do not think there has been. Petitioner is apparently perfectly ready to comply with the provisions laid down, and it seems to me that the information required can be gleaned from the paper itself, while, there is no prescribed form given in the Act showing how the information required is to be conveyed. As regards the previous warning referred to in the Magistrate's judgment, it appears that in one issue of the paper in August 1907, the required particulars were omitted; but in the issue now in question an endeavour certainly appears to have been made to comply with the requirements of Section 3. In my opinion, there has been no offence, and I forward the proceedings to the Chief Court with the recommendation that the conviction should be set aside, and the fine be ordered to be refunded, but if the Hon'ble Judges of the Chief Court should hold that the omission of the actual word "publisher" infringes section 3 of the Act, I would recommend that in that case, the fine should really be made a mere nominal one,

The judgment of the Chief Court was delivered by—

26th March 1909.

REID, C. J.—This is a reference by the Additional Sessions Judge of Lahore, recommending that the convictions of Ram Saran Datt printer, and Bhawani Das, manager, of the "*Arya Gazette*," Lahore, be set aside. The convictions are in respect of a copy of the paper with the following words printed in the margin of the front page "*ba ihtimam Ram Saran Datt printer, Hindustan Steam Press, Lahore, men Lala Bhawani Das,*" "*Manager ke liye chapa*" and are under Section 12, Act XXV of 1867, which prescribes a penalty for printing or publishing any paper otherwise than in conformity with the rule contained in section 3 of the Act.

That rule is that every paper printed and published in British India shall have legibly printed on it the name of (the printer and the place of printing and the name of) the publisher and the place of publication.

I see no reason to doubt that the correct interpretation of the rule is that the name of the printer as such, and the name of the publisher as such, must be printed. The object of the rule obviously is that the paper should clearly intimate who is liable as printer and who is liable as publisher, and I have no hesitation in holding that the words above quoted do not contain such intimation as to the publisher. The plea that the word "publisher" cannot be expressed in the vernacular language in which the paper is published is puerile. The English words "printer", "steam press" and "manager" are printed, and there is presumably no reason why the word "publisher" should not have been printed.

The allegation that in other newspapers printed in vernacular language, the words printed on the margin of this paper are printed with the intention of complying with the Act, is not relevant to the question whether an offence has been committed. It is relevant merely to the question of sentence.

Sections 3 and 12 do not deal with intention. If the rule contained in section 3 has not been complied with, an offence has been committed and is punishable under section 12. It is beside the question to contend that the persons convicted and fined, who are admittedly printer and publisher, attempted to comply with the law,

That, again, merely affects the sentence, printers and publishers cannot, in my opinion, be allowed to select for themselves the description to be used in professing to comply with the Act.

They must use the description prescribed by the Act, and a publisher cannot be described as "manager" instead of as "publisher," merely because the manager and publisher of many papers are identical. I see no reason for interference with the convictions, which are legal, and can be set aside only on the ground of illegality.

The fines are, however, in my opinion, excessive. The Public Prosecutor in the Court below pressed for a nominal fine only, and the same course has been adopted by Counsel for the Crown here. The annual subscription to the paper is two rupees eight annas only, and I do not consider fines of fifty rupees nominal, under the circumstances. I reduce the fine in each instance to five rupees. The balance paid in each instance will be refunded.

To this extent only the application for revision is allowed.

Sentence reduced.

No. 6.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

THE CROWN,—COMPLAINANT,

Versus

MUSSAMMAT DAULI,—ACCUSED.

Criminal Revision No. 1189 of 1908.

Criminal Procedure Code, section 476,—Magistrate who can take action.

Held that it is only the individual Magistrate before whom the offence was committed in Court, who can take action under section 476, Criminal Procedure Code.

Begu Singh v. Emperor ⁽¹⁾ followed.

Kartik Ram Bhakat v. Emperor ⁽²⁾ followed.

Runga Ayyar v. Emperor ⁽³⁾ dissented from.

Case reported by Major G. C. Beadon, Sessions Judge, Hoshiarpur Division, on 1st September 1908.

Duni Chand, for accused.

⁽¹⁾ I. L. R., XXXIV Cal., 551. ⁽²⁾ I. L. R., XXXV Cal., 114.

⁽³⁾ I. L. R., XXIX Mad., 331.

The facts of this case are as follows:—

In a criminal case *Mussammatt Dauli v. Sandlia*, etc., under section 107, Criminal Procedure Code, Mussammatt Dauli appears to have made a statement to the effect that she had married Faqir. This case was heard and decided by Sheikh Fazl Ilahi, Magistrate, 1st class, who dismissed the complaint. Subsequently in a case instituted in the Court of Lala Arjan Das, Magistrate, 1st class, on a report by the Police, Mussammatt Dauli appears to have stated that she was not married to Faqir. Lala Arjan Das, having ordered certain persons to find security for keeping the peace disposed of the case and issued notice to Mussammatt Dauli to show cause why she should not be prosecuted in respect of the above contradictory statements. Before the date fixed for Mussammatt Dauli to show cause Lala Arjan Das was transferred and the proceedings came before Lala Achhru Ram, Magistrate, 1st class, who, under Section 476, Criminal Procedure Code, has ordered the prosecution of Mussammatt Dauli.

The proceedings are forwarded for revision on the following grounds—

This is not a case in which an application for leave to prosecute has been made and sanction granted, and hence section 195 (b), Criminal Procedure Code, does not apply, but Mussammatt Dauli applies for revision of Lala Achhru Ram's order and the point for consideration is whether or not, Lala Achhru Ram had jurisdiction to pass the order. P. R. 25 (Cr.) of 1889 had reference to sanction granted under section 195, Criminal Procedure Code, and not to an order passed under section 476, Criminal Procedure Code. This judgment of the Chief Court, however, is authority for holding that there is no Court of a Magistrate of the 1st class as a permanent Court with a perpetual succession of Judges and that each Magistrate of the 1st class has a separate Court.

One of Mussammatt Dauli's statements was made to Lala Arjan Das in a judicial proceeding before him and Mussammatt Dauli's other statement came to the notice of Lala Arjan Das in the course of the same judicial proceedings. I think, therefore, that Lala Arjan Das, if he had not been transferred, could have ordered under section 476, Criminal Procedure Code, the prosecution of Mussammatt Dauli on an

alternative charge in respect of both statements although only one statement was made before him.

It is, however, evident that neither statement was made to Lala Achhru Ram, and that neither statement was brought under his notice in the course of a judicial proceeding, and as Lala Achhru Ram's Court cannot be treated as the same Court as that of Lala Arjan Das transferred, Lala Achhru Ram, in my opinion, had no jurisdiction under section 476, Criminal Procedure Code, to order the prosecution. Moreover, Lala Achhru Ram would have no jurisdiction under section 195, Criminal Procedure Code, to sanction a prosecution in respect of either of the two statements.

The above view is supported by *I. L. R. Cal. XXXV*, page 114, and as the Magistrate's order appears to have been passed without jurisdiction, I report the case for the orders of the Chief Court.

RATTIGAN, J.—The question involved is one of importance and no little difficulty. The views of the Calcutta High Court, *Begu Singh v. Emperor* ⁽¹⁾, *Kartik Ram Bhakat v. Emperor* ⁽²⁾ are opposed to those of the Madras High Court, *Runga Ayyar v. Emperor* ⁽³⁾. The question should be decided by a Division Bench and I direct accordingly. 25th Nov. 1908.

The order of the Division Bench was delivered by

ROBERTSON, J.—There is some conflict of authority on the point referred to us, but the weight of it is on the side of the view that it is only the individual Magistrate before whom the offence was committed in Court who can take action under section 476, Criminal Procedure Code. This appears to be logical, for otherwise there is no particular reason why the former should be restricted to the particular "Court" in which the offence was committed and should not extend at least to any Court to which it is subordinate. The reasoning in *Phina Singh v. The Empress* ⁽⁴⁾, supports this view, though that judgment does not deal directly with the exact point now before us. In *Runga Ayyar v. Emperor* ⁽³⁾ it was held that the Magistrate of the same Court could direct a prosecution under section 476, Criminal Procedure Code, though the Magistrate who made the order under section 476 was not the Magistrate 16th April 1909.

⁽¹⁾ *I. L. R.*, XXXIV Cal., 551.

⁽²⁾ *I. L. R.*, XXXV Cal., 114.

⁽³⁾ *I. L. R.*, XXIX Mad., 331.

⁽⁴⁾ 25 P. R., 1889, Cr.

who tried the case. But a Full Bench of the Calcutta High Court in *Begu Singh v. Emperor* ⁽¹⁾ laid down the rule that only the Judge or Magistrate who actually tried the case in the course of which the offence was considered to be committed could take action under section 476, Criminal Procedure Code. With this view we agree. In the case above quoted Maclean, C. J., remarked "Looking to the language of the "section it would be a strong thing to say that any one "might come some months afterwards and ask another "Judge who had not tried the case to exercise summary "and what I may call the immediate powers under that "section, the proper course would be to proceed under section "195." This view was followed in *Kartik Ram Bhakat v. Emperor* ⁽²⁾, and we hold it to be the correct one and we answer the reference accordingly.

⁽¹⁾ I. L. R., XXXIV Cal., 551.

⁽²⁾ I. L. R., XXXV Cal., 114.

No. 7.

Before Mr. Justice Kensington and Mr. Justice Johnstone.

THE CROWN,—COMPLAINANT,

Versus

HARDIT SINGH AND OTHERS,—ACCUSED.

REFERENCE SIDE.

Criminal Reference No. 1488 of 1908.

Criminal Procedure Code (Act V of 1898), sections 106 (3) and 107—Power of Appellate Court to take security to keep the peace—Procedure of Magistrate under section 107.

Held, that a Magistrate seized of a case under section 107 (3) and (4) of the Criminal Procedure Code cannot pass the summary order for security to keep the peace allowable by section 349 (2), but must go through the procedure prescribed in sections 112 to 117.

Held, also, that a Magistrate, as an Appellate Court, cannot act under section 106 (3) of the Code in *all* appeals before him, but only when the Courts below had itself the power to take security.

Case reported by W. H. Le-Rossignal, Esquire, Sessions Judge, Amritsar Division, with his No. 1417 of 1908.

Nand Lal, for accused.

The facts of this case are as follows :—

Parties to the case belong to one and the same village called Walipur. The cause of dispute is land. On 28th March 1908, 8 or 10 men belonging to accuseds' faction went to field No. 1406 armed with *lathis* and determined to plough it. The complainant informed the *Jambardar*, etc., who went to the spot and induced accuseds' party to go away. They had well-nigh succeeded in their efforts when a man called Ishar Singh appeared shouting abuse. This roused the ire of the accuseds' party who beat him (Ishar Singh). The complainant's faction joined in the conflict, and there was a general fight.

The accused, on conviction by C. M. King, Esquire, District Magistrate in the Gurdaspur District, were sentenced, by order, dated 5th August 1908, under section 147 of the Indian Penal Code, to a fine of Rs. 5 and to execute a bond for five hundred rupees with three sureties to keep the peace for three years.

The proceedings are forwarded for revision on the following grounds :—

Petitioners were first convicted under sections 147, 325, Indian Penal Code, and sentenced to a fine of Rs. 25 each by the

Tahsildar of Gurdaspur, a Magistrate of the 2nd class. The District Magistrate on appeal reduced the fine to Rs. 5 in each case under section 147 only, but also ordered that security should be furnished for three years under section 106, Criminal Procedure Code.

The security has been furnished, so no action under section 124, Criminal Procedure Code, is called for, but for the petitioners it is urged that as the Tahsildar was not competent to pass an order under section 106, Criminal Procedure Code, so also the District Magistrate, as Court of Appeal, could not pass such order. This view was adopted though the language used is not very emphatic or decided, in *Muthiah Chetti v. Emperor* (1), which was followed in *Radha Singh v. King-Emperor* (2).

For this reason I am bound to report the case for the Hon'ble Judges' orders.

I would nevertheless respectfully point out that in section 106 (3) there is no expression limiting the Appellate Court's powers. The powers of an Appellate Court and the revisional powers of the High Court are mentioned in the same breath and are apparently placed on one plane in this respect.

Would it be held that the High Court in revision could pass no order under section 106 (3) in a case originally disposed of by a 2nd class Magistrate? Of course section 439, Criminal Procedure Code, could be invoked, but section 106 (3) cannot be a mere superfluity. Section 423 (1) (b) (3), also is indirectly in favour of the view that the powers of an Appellate Court under section 106, Criminal Procedure Code, are unlimited, for the prohibition of enhancement of sentence is modified by the exception of the provisions of section 106 (3).

Submitted for orders.

ORDER OF THE CHIEF COURT.

19th March 1909. JOHNSTONE, J.—A Magistrate of the 2nd class tried a case of rioting combined with the infliction of grievous hurt, and in the end he fined each of certain accused persons. Then, having himself no power to take security for the peace from the accused, he recorded a second separate order on the same day submitting the file of the case to the District

(1) I. L. R., XXIX Mad., 190.

(2) 6 P. R., 1907, Cr.

Magistrate, with a suggestion that security for the peace be taken from "the leading members of both parties." The convicted persons appealed to the District Magistrate who altered the convictions to convictions under section 147, Indian Penal Code, cutting out section 325, and remarked that the case should have been sent to him under section 349, Criminal Procedure Code, with a view to the taking of security, and then and there reduced the fines and directed that each *accused person* should execute a bond with three sureties to keep the peace for three years, complainant's petition for revision being rejected. The same day, in a separate order, the District Magistrate noted that security had not been provided, issued a warrant for the accused to be kept in custody and sent the file to the Sessions Court under section 123 (2), Criminal Procedure Code, the term fixed being as aforesaid for over one year.

The learned Sessions Judge has now reported the case for orders.

Though he is himself unable to see that the District Magistrate's order was *ultra vires*, he refers the case because of the *dictum* in *Muthiah Chetti v. Emperor* ⁽¹⁾, followed in *Radha Singh v. King-Emperor* ⁽²⁾, which was a ruling by a single Judge. There are also the following authorities which require notice, namely, *Parama Siva Pillai v. Emperor* ⁽³⁾, *Mahmudi Sheikh v. Aji Sheikh* ⁽⁴⁾, *Emperor v. Momin Malita* ⁽⁵⁾, *Miran Bakhsh v. King-Emperor* ⁽⁶⁾, which last is by the same Judge as *Radha Singh v. King-Emperor* ⁽²⁾.

The District Magistrate is quite right in his view that the 2nd class Magistrate should have acted under section 349 (1), Criminal Procedure Code; that is to say, the latter should have merely recorded the opinion that the accused were guilty and should have forwarded the accused persons, with the file, to the District Magistrate, with the recommendation that the accused should be convicted and sentenced and that security should be taken under section 106 of the same Code. The District Magistrate could then under section 349 (2), have questioned the parties and after making further enquiry, if he thought fit, have passed an order of conviction and sentence and for the taking of security. But the 2nd class Magistrate did not do this. He convicted and sentenced

(1) *I. L. R.*, XXIX *Mad.*, 190.

(2) 6 *P. R.*, 1907, *Cr.*

(3) *I. L. R.*, XXX *Mad.*, 48.

(4) *I. L. R.*, XXI *Cal.*, 622.

(5) *I. L. R.*, XXXV *Cal.*, 434.

(6) 21 *P. R.*, 1905, *Cr.*

the accused himself, and therefore the District Magistrate, when the case was laid before him, could not properly act under section 349 (2) of the Code, and we must look elsewhere for his powers.

In our opinion the District Magistrate, though not seized of the case under section 349, was seized of it in two ways—first, under section 107 (3) and (4), and secondly, as an Appellate Court under section 106 (3), read with section 423 (1) (b) (3). A Magistrate seized of a case under section 107 (3) and (4), *i.e.*, on information which he sees reason to believe, cannot pass the summary order allowable by section 349 (2), but must go through all the procedure prescribed in sections 112, 113 (or 114 and 115, as the case may be) and 116 (if he thinks fit), and must hold the regular inquiry laid down by section 117, following the procedure prescribed in the Code for summons cases, and finally must dispose of the case under section 118 or section 119. The District Magistrate has done none of these things; and it is clear that, if his proceedings could only be referred to section 107 (3) and (4), we should have to set them aside, (*i*) because the necessary procedure detailed above had not been followed, (*ii*) because he has bound over these persons for three years, while section 107 only authorises binding over for a term “not exceeding one year.”

We turn, therefore, to the question of the District Magistrate's powers as an Appellate Court only, and this is the actual matter now referred to us. The wording of section 106 and of section 423 is very important, and we reproduce those provisions of law in so far as they concern us here:—

Section 106 (1): “Whenever any person accused of “rioting * * * is convicted of such offence before a High Court “a Court of Session or the Court of a Presidency Magistrate, “a District Magistrate, Subdivisional Magistrate or a Magistrate “of the First Class, and such Court is of opinion that it is “necessary to require such person to execute a bond for “keeping the peace, such Court may at the time of passing “sentence on such person, order him to execute a bond * * * “for keeping the peace during such period, not exceeding “three years, as it thinks fit.”

(3) "An order under this section may also be made by
"an Appellate Court or by the High Court when exercising
"its powers of revision."

Section 423 says that an Appellate Court may, after hearing
an appeal, dismiss it or may—

"(a) * * * * *

"(b) in an appeal from a conviction (1) * *

"(2) * * (3) with or without such
"reduction of the sentence and with or without
"altering the finding, alter the nature of the sentence,
"but subject to the provisions of section 106, sub-
"section (3), not so as to enhance the same."

The question for decision is, can an Appellate Court
act under section 106 (3) in all appeals before it, or only
when the Court below had the power to take security but
did not do it or at least did not do it to the satisfaction of
the Appellate Court?

We have been able to find two rulings of this Court
on section 106 (3), *viz.*, *Miran Bakhsh v. King-Emperor* (1),
and *Radha Singh v. King-Emperor* (2). At first sight they
seem irreconcilable, but on examination one sees that the
earlier ruling does not touch the question before us. The
appeal in that earlier case was to the Session Court and the
conviction appealed against must therefore have been a
conviction by a 1st class Magistrate, who, of course, could
act under section 106 (1) and take security from a person
convicted by himself. Naturally the learned Judge (Mr.
Justice Chatterji) ruled that the Sessions Judge, in hearing
the appeal, was competent to demand security to keep the
peace after the expiration of the sentence, the conditions precedent
to taking action under section 106 (1) being all-existent. In the
later ruling by the same Judge the conviction was by a Magistrate
not competent to act under section 106 (1) and the learned
Judge followed *Muthiah Chetti v. Emperor* (3), and without
discussing the matter further, held that the Appellate Court
could not in such circumstances take action under
section 106 (3).

The passage in the Madras case which concerns us runs
thus—"We think that the power given to an Appellate

(1) 21 P. R., 1905, Cr. (2) 6 P. R., 1907, Cr.

(3) I. L. R., XXIX Mad., 190.

“ Court to make an order under this section is not an
“ unlimited power to make such order in any circumstances
“ but is to be taken as giving the Appellate Court power
“ to do only that which the lower Court could and should
“ have done, and, therefore, that the power of the Court
“ to pass such an order is confined to cases where the
“ conviction has been by a Court named in the section.”

In *Paruma Siva Pillai v. Emperor* (1) the Court simply followed the ruling of the previous volume and also *Mahmudi Sheikh v. Aji Sheikh* (2). In the latter case it is pointed out, that section 106 and section 349 should be read together, and that if they are so read, it is clear that action under section 106 (3) can be taken by an Appellate Court only when the conviction appealed against was passed by, at the lowest, a 1st class Magistrate. The Calcutta ruling in Vol. 35 does not discuss the question, but merely follows the previous Calcutta and Madras rulings.

The way we look at the matter is briefly this—If instead of sub-section (3), section 106, Criminal Procedure Code, the Legislature had framed a distinct section of the Code, without any allusion in it to section 106 (1), and had by that section authorised all Appellate Courts in all cases of riot, etc., coming before them, to take security for the peace, the matter would have been quite different, and the power would have been exerciseable whatever the grade of the Court below might be. But the provision here is in a sub-section and must be taken to be limited as the main sub-section (1) is limited. The earlier sub-section contains two sets of limitations that only Magistrates of certain grades can act under it, and that action under it can be taken only, when the conviction is of a person accused of rioting, assault, offence including a breach of the peace, abetment of these, assembling of armed men and so forth. If sub-section (2) is not limited as sub-section (1) is, it would follow that on appeal in any case, e.g., theft, forgery—the Court could make the accused give security. This cannot have been the intention.

That this limitation was intended seems to us clear also from the facts (i) that the Legislature enacted section 349, which provides a method whereby a District Magistrate can act under section 106 (1), though the case was first laid before a 2nd or 3rd class Magistrate, and (ii) that the

(1) *I. L. R.*, XXX *Mad.*, 48.

(2) *I. L. R.*, XXI *Cal.*, 622.

Legislature, by enacting the very general section 107 (1), provided another method whereby the District Magistrate could take necessary steps to secure the preservation of the peace. No doubt under the latter method, the District Magistrate is obliged to follow, as explained above, the procedure prescribed in the following sections, 112 to 119, but this does not affect the argument.

The proper order, therefore, for us to pass in this case is to set aside the District Magistrate's order for security and to leave him, if he thinks fit, to take steps under sections 107 (1) and 112 to 119 against such persons as are likely to cause a breach of the peace. We pass this order now; and we may also observe that the 2nd class Magistrate's wish was that security be taken not from the accused alone but from the "leading members of both parties." We have dealt with the case at some length, because past experience, and also perusal of the various judgments noticed above, show that much difficulty has been found both in the Punjab and in other parts of India in interpreting sub-section (3) of section 106 of the Code. We approve of the *dictum* in *Rodha Singh v. King-Emperor* (1), and we have explained why we consider it good law.

Order set aside.

No. 8.

Before Mr. Justice Robertson and Mr. Justice Rattigan.

HIRA,—(CONVICT),—PETITIONER,

Versus

THE KING-EMPEROR OF INDIA,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 623 of 1908.

Criminal Procedure Code, Act V of 1898, Sections 253 and 437—Accused discharged—Order for re-trial by District Magistrate—Power of revision by Chief Court.

The accused was tried for an offence under section 406, Indian Penal Code. The Magistrate who tried the case, after hearing the whole of the evidence for the prosecution and after fully discussing the whole case discharged the accused, disbelieving the prosecution story, thereupon the complainant made an application for revision to the District Magistrate; who by order dated 5th December 1907, set aside the order of discharge and sent the

(1) 6 P. R., 1907, Cr.

case to the Court of another Magistrate for a re-trial. From this order an application for revision was made to the Chief Court, which was rejected on the 8th January 1908 by order of a single bench. The accused was then tried again and convicted. The conviction was confirmed by the Sessions Judge. On an application for revision, the Chief Court—

Held that a Criminal Court cannot review its own order. The order of the Chief Court, dated 8th January being clearly with jurisdiction, it cannot be interfered with on review, either by the same or any other bench of the Court.

Held, also, following *Jai Ram v. Mukhan* ⁽¹⁾ and *Dulla v. the Emperor* ⁽²⁾ that in a case where after taking the whole of the evidence for the prosecution and discussing the whole case fully, a Magistrate discharges the accused, an order by a District Magistrate for re-trial on the same evidence by another Magistrate, though not absolutely illegal, should not be made except in the rarest of cases.

Held, further that where such an order for retrial has been found to be not justified and seriously prejudicial to the accused, the Chief Court will go into the evidence of the case as if it were an appeal, to see whether the guilt of the accused has been brought home to him or not.

Petition for revision of the order of T. H. Leslie Jones, Esquire, Sessions Judge, Ferozepore Division, dated the 30th April 1908.

Ganpat Rai, for petitioner.

The order of the learned Judge in Chamber was as follows :—

17th Sept. 1908.

KENSINGTON, J.—The history of this case is as follows :—

The petitioner Hira, *sunar*, was in 1907 tried by Lala Labhu Ram, a Magistrate of experience, on an allegation of criminal breach of trust under section 406, Indian Penal Code. This Magistrate took the evidence of the whole of the prosecution witnesses entered in the *chalan* and also of six others whom he gave the complainant an opportunity of producing subsequently. He then disposed of the case in a long and carefully considered English judgment. His conclusion, for which he gave apparently good reasons, was that the complainant's story was entirely false and concocted. He discharged the petitioner under section 253, Criminal Procedure Code, and ordered the complainant to pay to him Rs. 15 as compensation by orders of the 6th November 1907.

The District Magistrate called for the case and on the 12th November wrote "seen and returned."

The complainant then moved the District Magistrate, ostensibly by appeal, and on the 5th December Mr. Atkins recorded an order saying that he would not give in detail his

(¹) 8 P. R., 1900, Cr.

(²) 2 P. R., 1901, Cr.

reasons for ordering a retrial as they might influence the Court to which the case would be sent. He merely remarked that Lala Labhu Ram's order was not in some respects correct according to the record, instancing, in particular, a receipt which *had not hitherto been placed on the record*. He expressed an opinion that the award of compensation to the petitioner was not warranted (a matter which he had no power to deal with himself, the order being that of a 1st class Magistrate), set aside the order of discharge, and remanded the case to the Court of Mr. Prenter for rehearing.

The petitioner then moved the Chief Court (Criminal Revision No. 5 of 1908) to set aside the order of retrial. This petition was on the 8th January disposed of by a learned Judge in the following terms :—

“ The order is not *illegal*, and I am averse to interfering with “ exercise of such discretion. Rejected.”

The petitioner has since been again tried by Mr. Prenter, convicted under section 406 and sentenced to imprisonment for a year and a fine of Rs. 100. The Sessions Judge has rejected the appeal save for correction of a mistake of Mr. Prenter's in regard to the period of solitary confinement.

The petitioner then filed the present petition for revision. To my mind there is a good deal of doubt about the whole case, but I do not consider it open to me to discuss the facts on revision in view of the concurrent findings of the two Lower Courts.

The point upon which, in my humble opinion, the petitioner ought to succeed is, that the District Magistrate's order of 5th December, directing a retrial, was improper. The authorities for this view are *Jai Ram v. Mukhan Lal* (1) and *Dulla v. The Empress* (2), neither of which have been referred to by the learned Judge who passed the order of 8th January 1908. If the matter rested with me, I should be inclined to set aside the conviction on the ground, that the entire second trial was unauthorised, the practical effect of the District Magistrate's order, on which the retrial was based, having been to set aside what was virtually an order of acquittal. There was nothing manifestly perverse or foolish about the order of discharge by Lala Labhu Ram. On the contrary he gave sound reasons for it, and I am not convinced by the second trial that the reasons given were incorrect.

It would, however, be obviously improper for me to act on my views of the case, as they imply, that I dissent from the order of the 8th January.

* * * * *

I, therefore, think it right to refer this petition for revision to a Division Bench to determine the question whether the rulings of the Court justify the order of 8th January 1908. The question is of some importance as cases of the kind are not infrequent, and it is desirable that they should be dealt with, as far as possible, on uniform lines. Rightly or wrongly, I have hitherto held, on what I understood to be the rule of practice adopted by the Court, that a District Magistrate has no *discretion* to order a retrial merely because he thinks that an order of discharge may possibly be mistaken, provided (1) that the original Magistrate took all available evidence and weighed it intelligently, and (2) that his order of discharge was not to quote the wording of *Dulla v. The Empress* (1), “manifestly perverse or foolish.”

Incidentally, it may be noted that we have now reached the curious result that Lala Labhu Ram's order directing the complainant to pay compensation to the petitioner has never been set aside by competent authority and, therefore, still holds good, while at the same time the petitioner has been convicted and heavily sentenced.

The case is accordingly referred to a Division Bench. The petitioner will, in the meanwhile, remain on the bail to which he was admitted by my order of 16th July.

The judgment of the Division Bench (Robertson and Rattigan, JJ.) was delivered by—

20th March 1909.

ROBERTSON, J.—One Hira was tried for an offence under section 406, Indian Penal Code, and on 6th November 1907 the Magistrate who tried him recorded his judgment. The whole of the evidence for the prosecution was heard, and in a detailed judgment, in which the whole case was fully discussed, after giving many cogent reasons for disbelieving the prosecution story, the Magistrate discharged the accused, holding that there was not even enough proof to justify the drawing up of a charge sheet.

An application for the revision of this order was made to the District Magistrate, who passed the following order:—“.....I “set aside the order of discharge and remand the case to the Court “of Mr. Prenter, Magistrate, 1st class, for a rehearing”.....

From this order an application was put into this Court for revision and cancellation of the District Magistrate's order for a retrial. This came before our brother Johnstone, who, on 8th January 1908, rejected the petition in the following order:—"The order is not illegal, and I am averse to interfering with exercise of such *discretion*. Rejected."

The case was accordingly reheard by Mr. Prenter, Magistrate, 1st class, and the accused was convicted and sentenced on 6th April 1908.

From that conviction Hira, accused, appealed, and his appeal was dismissed by the learned Sessions Judge on 30th April 1908.

An application for revision has been put in to this Court and was heard, in the first instance, by our brother Kensington, who, by an order of 17th September 1908, for reasons given, referred the case to a division bench, and it is now before us for consideration.

Mr. Ganpat Rai for the petitioner asks us to set aside the order of our brother of 8th January 1908, to quash the whole of the proceedings in the second trial, and to restore the order of discharge, dated 6th November 1907. To this only one reply is possible. It has been *laid down time after time* that a Criminal Court cannot review its own judgments. The order passed by a bench of this Court clearly with jurisdiction, dated 8th January 1908, cannot be interfered with on review, either by the same or any other bench of this Court, and so far we have no hesitation in saying that the petition must be rejected, and we reject it accordingly.

We have now to consider the application for the revision of the order of conviction and sentence passed by the learned Sessions Judge on appeal, dated 30th April 1908.

Under ordinary circumstances whatever doubts we might have as to the correctness of the decision, we should have had some difficulty in upsetting the findings, if the case were treated simply as an ordinary application for revision. But while we are not competent to review our former decision (passed by a different bench of this Court), dated 8th January 1908, we do not feel ourselves in any way precluded from considering the propriety or otherwise of the order of the District Magistrate directing a retrial, dated 5th December 1907, or from dealing with the case now as we may find necessary in the interests of justice.

To return, we find that Labhu Ram, Magistrate, 1st class, tried the case originally with great care, and on 6th

November 1907, passed a judgment, fully discussing the case in all its aspects and finding that the charge was false. It was never even pretended that any further evidence was forthcoming for the prosecution, but on an application for revision of the first Court's order of discharge, and for an order for a retrial, the District Magistrate, on 5th December 1907, recorded the following order :—

“ I have heard the pleaders at some length. I do not wish “ to give in detail my reasons for ordering a retrial, as they may “ influence the Court to which the case is to be sent.

“ I will merely remark that the order of the Magistrate, 1st “ class, Lala Labhu Ram, is not in some respects correct according to the record.

“ The receipt purporting to have been executed by the “ complainant on 16th June 1907 has not been considered or “ seen, it has now been placed on the record. There is no proof “ whatever beyond the accused's statement of any debt due by the “ accused to the complainant, and the receipt is not for money “ paid in satisfaction of a debt but *waste nugsan khangi*.

“ I may, therefore, express the opinion that in any case the “ award of compensation under section 250, Criminal Procedure “ Code, was not warranted. I set aside the order of discharge “ and remand the case to the Court of Mr. Prenter, Magistrate, “ 1st class, for a rehearing. The accused will furnish security “ of rupees 100 for his appearance before that Court or will “ remain in lock-up.”

This order, we must point out, ignores the principles laid down in a long series of rulings, including those of our own Court, published in *Jai Ram v. Mukhan Lal* ⁽¹⁾ and *Dulla v. The Empress* ⁽²⁾, and directs a retrial, because the District Magistrate thinks, a conclusion which does not appear to us well supported, that the Magistrate Labhu Ram's order was not in some respects correct according to the record, and because a receipt put in *as part of the defence, be it observed*, and no part of the case for the prosecution has not been considered or seen. It is a little difficult to see, *à priori*, how it could be a good ground for retrial of a case which had been dismissed on account of the weakness of the prosecution-evidence that a strong piece of evidence for the defence had not been considered.

* * * * *

(1) 8 P. R., 1900, Cr.

(2) 2 P. R., 1901, Cr.

We may further remark that when a retrial is ordered upon the same evidence, it is futile to contend that the accused is not seriously prejudiced.

* * * * *

The perfectly obvious fact that an accused must be prejudiced by an order to an inferior to retry a case on evidence once disbelieved, is one of the many cogent reasons for holding that, though not absolutely illegal, such a course should only be taken in the rarest of cases. The manner in which this Court considers that such cases should be dealt with, is well illustrated, by an order of a bench of this Court, dated 27th January 1909, in *Crown v. Phul Chand and others*, refusing to order a retrial in a case in which the accused had been discharged.

* * * * *

The bench of this Court in that case took an entirely different view from that taken by the District Magistrate, but declined to interfere in face of the conclusions on the subject, and in view of the fact that the case for the prosecution had been fully heard and dealt with by the Magistrate.

* * * * *

We have, therefore, reached this point, we consider that it was quite incorrect to order a new trial, and that the order of the District Magistrate of 5th December 1907 was calculated seriously to prejudice the accused. But that order was passed, was upheld and is not actually illegal, and we have now before us a conviction of, and sentence upon, Hira by a competent Court upheld on appeal. After mature consideration we have come to the conclusion that the correct course for us to follow now, is to hear this case as if an appeal lay to us. We do not feel justified in setting aside the conviction and sentence not being illegal, because we are convinced that no retrial should have been ordered, if we find that the guilt of the accused is brought home to him. We, therefore, proceed now to try the case itself as an appeal, i.e., to go into all the facts in order to satisfy ourselves as to the guilt or innocence of the accused.

* * * * *

In regard to the conduct of the trial generally by the first Court, we feel bound to point out that the attitude adopted seems to have been incorrect. Instead of giving the accused the benefit of the doubt and declining, as he should have done to presume anything against the accused, and calling upon the complainant to prove his case beyond all reasonable doubt, the

accused has been called upon to prove his innocence. The Magistrate himself makes this curious remark in his judgment, and it shows exactly what was really done :—

“..... constituted a strong *prima facie* case, and I, accordingly, framed a formal charge and called on him to prove his “innocence.” This is, as we much regret to have to point out, not by any means a correct attitude of mind, but one which is too common.

To begin with a mere *prima facie* case would in itself hardly justify a conviction, but even when a case sufficient by itself to justify a conviction has been made out, all that an accused can be called upon to do is to rebut that case and to show that *his guilt* has not been established. This attitude was, of course, largely the result of the prejudice inevitably caused to the accused by the District Magistrate's order for a retrial. We are quite sure that the Lower Courts intended to do nothing but justice, but we are nevertheless unable to modify the views expressed above.

We have no hesitation in coming to the conclusion that the charge against Hira, accused, is *not* proved beyond reasonable doubt, and we accordingly, as we have heard this as an appeal, set aside the conviction and sentence, and direct the discharge of the petitioner from bail forthwith.

At the same time and under the circumstances, we set aside the order awarding compensation.

Revision accepted.

No. 9.

Before Mr. Justice Johnstone.

MANGI RAM (CONVICT)—PETITIONER.

Versus

THE KING EMPEROR OF INDIA—RESPONDENT.

Criminal Revision No. 410 of 1909.

Cantonment Code, 1899—Chief Court's power to revise orders inflicting a fine under section 283—Section not applicable to breaches of conditions of a license—convict is entitled to copy of proceedings.

Held, that an order inflicting a fine under section 283 of the Cantonment Code, 1899, for breach of the conditions of a license is a judicial order and the Chief Court has therefore full power to revise it.

Held, also, that Section 283 is inapplicable to such a case.

Held, further that a convicted person is entitled to a copy of the proceedings in the Summary Register.

Petition under section 283 of the Cantonment Code, 1899, for revision of the order of Lieutenant E. G. Hamilton, Cantonment Magistrate, Dagshai, dated the 4th November 1908.

Shelverton, for petitioner.

Government Advocate, for respondent.

The admitting order was made by—

REID, C. J.—The Assistant Cantonment Magistrate reports to have fined the petitioner under section 283 of the Cantonment Code for breach of the conditions of his license, but has not specified the provision of the Code justifying such action.

Section 284 provides that no person shall be liable to punishment for a breach of a provision of the Code unless complaint of the breach is made within three months of the commission thereof before a Magistrate having jurisdiction to entertain the complaint.

An order inflicting a fine is therefore a judicial order, not merely an executive order.

The license issued to the petitioner provided for cancellation or suspension in the event of the licensee doing what the petitioner has been found by the Magistrate to have done, but did not provide any other penalty. The matter is of considerable importance and the Crown should be represented. Very early date.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—The order of fine in this case was illegal. 3rd April 1909.
It is said to have been passed under section 283, Cantonment Code, 1899, which runs thus :—

1. "Whoever in any case in which a penalty is not expressly provided elsewhere in this Code, fails to comply with any notice thereunder or otherwise commits a breach of any of the provisions thereof, shall be punishable with imprisonment for a term which may extend to eight days or with fine which may extend to fifty rupees, and in the case of continuing breach with an additional fine not exceeding five rupees for every day after the first, in regard to which he is convicted of having persisted in the breach.

2. "In lieu of, or in addition to, any fine imposed under this Code, the Court may require the offender to remedy,

“ so far as it lies within his power to do so, any mischief in “ respect of which the fine is imposed.”

As pointed out by the Hon'ble Chief Judge in his order of 17th February in this case, the proceeding in the course of which these fines were inflicted must be taken to have been a judicial proceeding, and therefore this Court has full revisional powers.

Only one of the persons fined has applied, but this Court can, and I think should, deal with all the fines, as the offenders were tried together and found guilty on exactly similar facts.

It seems quite clear that no sentence of fine was admissible. Section 283 has no bearing on the case. It is not in evidence that any “ notice ” was issued to the petitioner or his comrades in misfortune and that he or they failed to comply with any such notice or otherwise committed a breach of the provisions thereof ; and thus section 283 cannot be invoked. Cancellation or suspension of the license is apparently the only lawful penalty. The learned Government Advocate admits all this and says he cannot support the order of fine.

I would also point out to the Magistrate that he was wrong in not giving] petitioner a copy of the proceedings [in his Summary Register, which has been laid before me, as petitioner was fully entitled to such copy.

I set aside the order fining Maghi Ram and the others and order the fines to be refunded.

Revision accepted.

No 10.

Before Mr. Justice Williams.

SULTANI AND OTHERS—(ACCUSED) - PETITIONER,

Versus

THE CROWN—RESPONDENT.

Criminal Revision No. 446 of 1909.

Jurisdiction of committing Magistrates to weigh the evidence of direct witnesses in cases triable by Sessions Courts.

Held, that a committing Magistrate is entitled at any rate to some extent to weigh the evidence of direct witnesses and to pronounce a verdict to their credibility.

Petition under section 439, Criminal Procedure Code, for revision of the order of H. A. Rose, Esquire, Sessions Judge, Ambala Division, dated the 27th March 1909.

Oortel, for petitioners.

Government Advocate and Tirath Ram, for respondent.

The judgment of the learned Judge was as follows :—

WILLIAMS, J.—In this case three men, named Sultani, Bhola Singh and Sundar, were discharged by Syed Wali Shah, first class Magistrate in Ludhiana, in respect of a charge of murder which he heard as committing Magistrate. Thereupon one Bishna (of whom I shall have to say more presently) moved the Sessions Judge of the Ambala Division to direct their committal to the Sessions, and his petition was accepted by Mr. Rose. On that the three accused men have asked this Court for revision of Mr. Rose's order, and their application is opposed by the Crown through the learned Government Advocate.

18th June 1909.

The grounds advanced by the learned Sessions Judge for directing a commitment of the three men were that "it is not denied that the witnesses Bishna and Indar say that they saw the three accused Sultani, Bhola Singh and Sundar Singh kill the deceased."

He, therefore, argued that the Magistrate had no jurisdiction to discharge the accused, as his doing so involved a finding as to the credibility of the prosecution evidence. All that he would allow to the lower Court was the function of deciding whether the evidence, if credible, was sufficient to justify a conviction.

Now in the first place it is noticeable that so far from both of these witnesses having stated that they saw the three men kill the deceased, the utmost they attest is that they saw them running away from the spot where the man who was dying called out that his enemies had killed him. Both of them, in fact, directly deny that they saw the act of murder committed. But the main point for decision is whether a committing Magistrate is entitled, at any rate to some extent, to weigh the evidence of direct witnesses and to pronounce as to their credibility. The Allahabad High Court has, in a series of judgments—*Lachman v. Juala* ⁽¹⁾, in re

⁽¹⁾ *I. L. R. V. 411*, 161.

the petition of *Kalyan Singh* (1), and *Fattu v. Fattu* (2)—decided that provided he uses due caution and that where the question is one of probabilities only, he leaves the decision to the Sessions Court, he is entitled to use his discretion and discharge the accused if he disbelieves the evidence. In opposition to these cases I have been referred to *Queen Empress v. Nand-v Satvaji* (3) (see particularly p. 374) and *Emperor v. Varjivandas* (4), and also to *Hazara Singh v. Bishen Singh* (5). But it will be noticed that in all of these three judgments the learned Judges have required that there must be “credible witnesses” or “credible evidence” who or which if believed would make out a *prima facie* case, before it becomes the Magistrate’s duty to commit an accused person for trial; and the head note to *Hazaru Singh v. Bishen Singh* (5) which omits this word ‘credible’ before evidence appears to me in error. What then are credible witnesses and what is credible evidence? The word credible can hardly have relation to the highly artificial rules relating to incompetent and competent witnesses under the older law of evidence in England: and there seems no reason why it should not be construed in its plain sense of “entitled to belief.”

The question then arises whether the evidence of the witnesses for the Crown in this case was reasonably entitled to belief, having regard to the principles laid down by the Allahabad High Court that due caution must be used before rejecting any positive testimony, and that when the question is merely one of probabilities the duty of the committing Magistrate is, to leave a decision to the Sessions Court, I do not see how in the present case the Crown evidence can be described as credible. The public prosecutor before the committing Magistrate has expressed the opinion that the evidence on the file is not sufficient to justify a committal. The two principal witnesses, who by the way do not give the direct evidence that the Sessions Judge supposed, are admittedly deadly enemies of the three accused men. Of these two witnesses, one was the individual who moved the Sessions Court to direct a committal after the accused men had been discharged, which sufficiently indicates his concern in the case: while the other testifies the night of the occurrence being

(1) *I. L. R. XXI All.*, 265(2) *I. L. R. XXVI All.*, 564.(3) *I. L. R. XI Bom.*, 872.(4) *I. L. R. XXVII Bom.*, 84.

(5) 14 P. R. 1908, Cr.

dark and he sitting at some little distance from where the murderers were running, that he identified the three accused by a single flash of lightning—a flash, which all the other witnesses failed to notice. This is practically the whole of the evidence on the record.

It is true, that on the next day when the three men were arrested at the Kutcherry, Bhola Singh and Sultani were found to be wearing clothes which bore traces of blood when examined. It is also true that the two boys, Bakhshish Singh and Kesar Singh, who were sitting near the line which the murderers took in escaping, say, that they saw two men run wearing clothes which bear no resemblance to those which had the traces of blood. I do not say that these statements are conflicting: but the fact remains that Bakhshish Singh and Kesar Singh's evidence either relates to men before the Court or it does not. If it does not, then the relevance of it is not very obvious: while if it does, then the inference is, that the murderers went home and changed their clothes and were so unfortunate as to put on garments which had traces of blood on them.

It appears to me that the evidence for the Crown recorded in this case was of a kind on which no Court would convict, and that that being so, the committing Magistrate exercised a sound discretion in discharging the accused men. It has to be remembered that on the one hand if a committing Magistrate improperly declines to commit, very full powers for correcting the error are to be found in section 436 of the Criminal Procedure Code. And on the other hand, the mischiefs that may ensue from prisoners being committed for trial precipitately and with a complete disregard of the probabilities of success are, by no means, slight; for when once an accused person is committed, the trial must go on irrevocably to the conviction or acquittal in the Sessions Court of the person charged: and no matter what convincing evidence may subsequently be forthcoming, all possibility of obtaining justice against him is at an end. It seems to me, therefore, that committing Magistrates, in sifting out those cases in which no Court can possibly convict, perform an important public duty, and one entirely within their jurisdiction.

I accordingly accept these applications, and reversing the orders of the learned Session's Judge, I affirm the order of the first class Magistrate who discharged the applicants.

No. 11.

Before Mr. Justice Rattigan and Mr. Justice Williams.

MAN SINGH—PETITIONER,

Versus

THE KING-EMPEROR OF INDIA—RESPONDENT.

Criminal Revision No. 1506 of 1903.

Legal Practitioners Act, XVIII of 1879, section 36—competency of Chief Court to revise orders under section 13 declaring a person a tout.

Held, that proceedings under the Legal Practitioners Act, XVIII of 1879, are neither civil or criminal, and consequently an order under section 36 of the Act cannot be revised by the Chief Court except under its power of superintendence under section 13 of the Punjab Courts Act.

Held, also, that subordinate Courts have a very considerable discretion in the matter of publishing lists of touts, and the Chief Court will not interfere with any such order, unless it can be shown that the provisions of section 36 have not been duly complied with or that there are other good and substantial reasons.

Petition under section 36 of the Legal Practitioners Act for revision of the order of Major G. O. Beadon, Sessions Judge, Hoshiarpur Division, dated the 2nd September 1908.

Sohan Lal, for petitioner.

The order referring the case to a Division Bench was as follows :—

1st March, 1909.

RATTIGAN, J.—I am very doubtful whether it is competent to this Court to interfere with an order passed by a subordinate Court under section 36 of the Legal Practitioners Act, 1879, declaring a certain person to be a "tout." Apparently this Court has, on various occasions, held that it had power to deal with such orders (see *Chanan Das v. Queen-Empress* (1) Cr. Rev. No. 3080 of 1897; Cr. Rev. No. 1010 of 1899), but there seems to be much force in the very recent decision of the Allahabad High Court to a contrary effect (*in the matter of Kedar Nath* (2)). I accordingly refer the question to a Division Bench.

The judgment of the Court was delivered by—

24th June, 1909.

RATTIGAN, J.—The question referred to the Division Bench is, whether it is competent to the Chief Court to interfere with

(1) 3 P. R., 1900, Cr.

(2) 6 All., L. J. 22.

the order of a subordinate Court under section 36 of the Legal Practitioners Act, 1879, declaring a person to be a "tout" as defined in section 3 of the Act.

Proceedings under the said Act are neither civil or criminal and consequently an order under section 36 cannot be revised under either section 622 of the Civil Procedure Code (or section 70 of the Punjab Courts Act) or section 439 of the Criminal Procedure Code, *Jaimal Singh v. Bhagwan Das* (1). Nor does the Legal Practitioners Act itself make any provision for appeals or applications for revision in respect of an order under that section.

On the other hand, this Court has wide powers of superintendence under section 13 of the Punjab Courts Act, and in virtue of those powers it is, we think, competent to consider and deal with an order passed by a subordinate Court under section 36 of the Legal Practitioners Act. At the same time very considerable discretion in the matter of preparing and publishing its list of "touts" is afforded to the subordinate Court and this Court will not interfere with any order passed under Section 36 unless it can be shown that the provisions of that section have not been duly complied with or for other good and substantial reason. For example, it would be a good ground for a petition to this Court that the petitioner's name was included in a list of touts without any opportunity being given to him of showing cause against such inclusion. Similarly, this Court will in a proper case interfere, if it finds that there is no evidence whatever to support the finding of the subordinate Court, or that the evidence, such as it is, cannot legally be accepted as proving that the petitioner is a "tout" within the meaning of the definition of that term given in section 3 of the Act, (see *Chanan Das v. Queen-Empress* (2)). In the matter of the petition of *Madho Ram* (3). In the present case we can find absolutely no evidence to the effect that the petitioner, Man Singh, is such a "tout." The statements of the two legal practitioners (Messrs. Sundar Das and Moti Lal) do not show that petitioner ever acted as a tout, and the post-card, upon which the Divisional Judge's finding is based, certainly does not establish that fact. Before a man can be held to be a tout, it is essential to prove that he received a remuneration from a legal practitioner, and in consideration thereof

(1) 41 P. R., 1888, Cr.

(2) 3 P. R., 1900, Cr.

(3) I. L. R., XXI All., 181.

procured the employment of the latter in any legal business, or that in consideration of any such remuneration he proposed to a legal practitioner to procure his employment in any legal business. In the present case there is absolutely no evidence that, in consideration of any remuneration moving from a legal practitioner, the petitioner either procured or proposed to procure the employment of that practitioner in a legal business. The Divisional Judge relies entirely upon the post-card, but we cannot read it as meaning anything more than that the addressee should "settle" with the writer because the writer and his employer had not taken up the case brought against the addressee. Mr. Sundar Das has denied any knowledge of the case to which the post-card refers, and there is not a scrap of evidence that Man Singh in writing it was endeavouring to procure the employment of Mr. Sundar Das in consideration of remuneration moving from that gentleman.

We accordingly accept the petition and set aside the order of the Divisional Judge, dated 2nd September, 1908.

Revision accepted.

No. 12.

Before the Hon'ble Mr. Justice Shah Din.

THE CROWN,—COMPLAINANT,

Versus

BHANA,—ACCUSED.

Criminal Reference No. 2 of 1909.

Criminal Procedure Code, 1898, sections 147 and 439—Notice of procedure under section 147 necessary—Grave irregularity if not given—Revision by Chief Court.

Held, that notice of procedure under section 147, Criminal Procedure Code, must be given to accused to give him an opportunity of showing that the right claimed has not been exercised within three months next before the institution of the enquiry, *Also* that it is a grave irregularity in the exercise of jurisdiction if no such notice is given.

Held, further, that the Chief Court has power under section 439, Criminal Procedure Code, to interfere on the revision side with such orders.

Case reported by the Additional Sessions Judge, Ferozepore Division, on 18th December 1908.

Roshan Lal, for accused.

The facts of this case are as follows :—

On 30th March 1908 Thola and Musa brought a complaint under sections 447 and 323, Indian Penal Code, against Bhana,

etc., alleging that they (Bhana, etc.) had committed trespass by erecting a wall on some vacant land attached to a mosque in Mari Mustafa, *tahsil* Moga, and that they had appeared on the spot armed with sticks, and would have beaten them (Thola and Musi) but for the timely arrival of the villagers and a police-constable. The District Magistrate, Ferozepore, sent the complaint to Mr. Parsons who returned it after recording his opinion that a local enquiry was necessary. The District Magistrate transferred the case to his own Court and sent it to the Naib-Tahsildar, Moga, for enquiry under section 202, Criminal Procedure Code.

The Naib-Tahsildar reported that the number in dispute was entered in 1853 as containing only a *kachha* building for the mosque, and that the rest of the land was shown as "rasta," but that there was long-standing enmity between Thola and Bhana. He also added that the case was an outcome of enmity, and that Thola and Bhana were likely to commit a breach of the peace. On this report the District Magistrate dismissed the complaint under section 203, Criminal Procedure Code, and sent the file to the Magistrate of the *ilaga* for any action that may be necessary under section 107 or 145, Criminal Procedure Code.

The Magistrate after holding some enquiry under section 107, Criminal Procedure Code, on 20th July 1908, determined to take action under section 145, Criminal Procedure Code, and ordered the parties to put in written statements. ||

After taking evidence Sheikh Muhammad Najam-ud-din, Extra Assistant Commissioner, exercising the powers of a Magistrate of the 1st class in the Ferozepore District, held that the land in dispute was public land and passed an order, dated 16th November 1908, under section 147 of the Criminal Procedure Code, thereby directing Bhana petitioner to demolish the wall.

The proceedings are forwarded for revision on the following grounds :—

Application for revision is made on the grounds —

(1) that no notice of proceedings under section 147 was given and that the applicant was thereby prejudiced,

(2) that the finding is against the facts, and that the applicant's possession was established by the report of the Naib-Tahsildar to the District Magistrate.

Another point arises whether in view of the fact that the managers of the mosque do not resent the encroachment (if it is an encroachment), whether it is proper to take action under section 147 at the request of an admitted enemy of the applicant.

On the above grounds Mr. Henriques issued notice to the respondent. The notice has since been served, and I have heard the parties on both sides. To what Mr. Henriques has said I must add that both parties have been placed on security under section 107, Criminal Procedure Code; and that the learned Magistrate in his order distinctly stated that the remaining portion of his order was passed as against Bhana under section 147, Criminal Procedure Code, and as against Thela under section 145, Criminal Procedure Code. He ordered Bhana to demolish two comparatively new walls, the date of the erection of which is uncertain, but they were clearly on the spot when Mr Iqbal Hussain, Naib-Tahsildar, went there on 17th April 1908. He made a report wherein also it was stated that Bhana had been in possession of the land in dispute since 1853. The first order of inquiry under section 145, Criminal Procedure Code, was passed on the 20th July 1908, and no separate notice of the proceedings under section 147, Criminal Procedure Code, was given.

Even if it could be held that no further order of enquiry under section 147, Criminal Procedure Code, was necessary in view of the order already passed under section 145, Criminal Procedure Code, the order of demolition issued under section 147, Criminal Procedure Code, is illegal, because it is equivalent to an order permitting Thela to exercise a right over the land, which he cannot have exercised within three months next before the institution of the inquiry. Further I think that Bhana, the petitioner, was distinctly prejudiced, because if he had had notice of an order under section 147, Criminal Procedure Code, he would no doubt have raised this point, which the learned Magistrate has himself overlooked, or, at all events, has not discussed.

It may be added that the *mutualis* of the mosque have no complaint against Bhana, who, they say, has given them land for the mosque.

The other part of the learned Magistrate's order was a declaration under section 145, Criminal Procedure Code, that Bhana was entitled to use the land for stacking rubbish, and

that Thola was not entitled to disturb him until evicted therefrom in due course of law. Against this part of the order there is no petition.

For the reasons already given, I hold that the order passed under section 147, Criminal Procedure Code, is illegal, and I also think that even if legal, it would, in the circumstances, have been ill-advised. I submit the case to the Chief Court for revision with the recommendation that the order under section 147, Criminal Procedure Code, be quashed.

The judgment of the Chief Court was as follows : -

SHAH DIN, J.—For the reasons recorded in full by the *6th April 1909.* learned Additional Sessions Judge, in which I concur, I am of opinion that the order passed by the Magistrate under section 147, Criminal Procedure Code, is *ultra vires* and bad in law, and I, therefore, set it aside. The procedure laid down in the afore-said section has not been complied with by the Magistrate, with the result that Bhana has had no opportunity of showing that the wall in question had been in existence for more than three months prior to the institution of the enquiry, and that during that period Thola and others could not have enjoyed the alleged right of way over the disputed land to the mosque. Bhana was clearly entitled to produce evidence on this point, if he desired to do so, and in the event of his proving that the alleged right of way had not been exercised by the people frequenting the mosque within three months before the commencement of the enquiry, the Magistrate would be debarred by the proviso to section 147, Criminal Procedure Code, from passing an order as to the demolition of the wall built by Bhana.

The Magistrate having acted with grave irregularity in the exercise of his jurisdiction, this Court has power under section 439, Criminal Procedure Code, to interfere with his order on the revision side, *Dhani Ram v. Bhola Nath* ⁽¹⁾ and *Abdulla Khan v. Gunda* ⁽²⁾.

I set aside the Magistrate's order, dated the 16th November 1908, and send the record back to the Magistrate with a direction that he proceed in accordance with law.

Order set aside.

⁽¹⁾ 33 P. R., 1902. Cr.

⁽²⁾ 7 P. R., 1907, Cr.

No. 13.

Before the Hon'ble Mr. Justice Shah Din.

THE CROWN,—COMPLAINANT,

*Versus*DINA NATH, *Patwari*,—ACCUSED.

Criminal Revision No. 729 of 1909.

Punjab Municipal Act, XX of 1891, section 92, sub-section (4) and section 145—Infringement of bye-law framed by the Kasur Municipality.

Held, that non-compliance with the provisions of the first part of sub-section 4 of section 92 of the Municipal Act, XX of 1891, does not of itself make a person criminally liable to the penalty provided for the infringement of a bye-law framed by a Municipal Committee under the said section ; it only enables the Committee to issue a notice to him, calling upon him to alter or demolish the building.

Held also, that the bye-law framed by the Kasur Municipality under section 92 of the Punjab Municipal Act, a breach of which is punishable with a fine, does not make it obligatory on the person giving to the Committee a notice of his intention to erect or re-erect a building, to refrain from so erecting or re-erecting within six weeks from the date of that notice, and the provisions of sub-section 4 of section 92 of the Municipal Act cannot be read into the bye-law as framed by the Committee.

Case reported by Captain A. A. Irvine, Sessions Judge, Lahore Division, dated 8th June 1909.

Mehr Chand, for accused.

Muhammad Amin, Secretary, Municipal Committee, Kasur, for respondent.

The facts of this case are as follows—

It is alleged that a wall of petitioner's house fell down during the heavy rains of last hot weather, and that on the 7th September 1908 he filed an application for permission to rebuild, and with his application he filed a plan. On the 12th October, it appears, a sub-Committee visited the spot and found that the wall had already been rebuilt without Municipal sanction having been accorded.

The accused, on conviction by M. Siraj-ud-Din, exercising the powers of a Magistrate of the first class in the Lahore District, was sentenced, by order, dated 17th April 1909, under section 145 of the Municipal Act, to a fine of Rs. 30 or in default to undergo simple imprisonment for a term of 15 days.

Notes.—Fine realized.

The proceedings are forwarded for revision on the following grounds. :—

Under section 145 of the Punjab Municipal Act the petitioner has been ordered to pay a fine of Rs. 30, or in default to undergo simple imprisonment for a term of 15 days. The first point to be noticed is that, except for a very brief statement by a sub-Overseer of the Kasur Municipal Committee, there is no evidence for the prosecution. From the statement of petitioner-accused, and the application which he filed, it appears that a wall of petitioner's house fell down during the heavy rains of last hot weather; and that on the 7th September he filed an application for permission to rebuild, and with his application he filed a plan. On the 12th October, it appears, a sub-Committee visited the spot and found that the wall had already been rebuilt, without Municipal sanction having been accorded. The statements of petitioner and his witnesses are to the effect (and there is nothing to rebut these statements) that, when many houses were collapsing during the heavy rains, oral permission was given by the Sub-Divisional Officer to the effect that all and sundry might rebuild without going through the usual formalities. It is argued for petitioner that the same kind of general permission was announced in Lahore at the same time by beat of drum, the object being to prevent further danger to life and property.

Be this as it may, I do not think that in the present case the petitioner could be legally convicted of any offence. Section 92 of the Municipal Act lays down the procedure to be followed, when any person intends to erect or re erect a building; and that section commences: "Every person who intends to erect or re-erect any buliding shall, if required to do so by any bye-law, give notice in writing, etc.,..... and the Committee may, within six weeks after the receipt of such notice, either refuse to sanction, etc." sub-section 4 of section 92 runs as follows.—

"Should any such building be begun or erected without giving notice, or without submitting such plans and specifications as aforesaid, or in contravention of any legal order of the Committee issued within six weeks of receipt of a valid notice under sub section (1), the Committee may, by notice to be delivered within a reasonable time, require the building to be altered or demolished as it may deem necessary."

Section 145 of the Municipal Act empowers the Committee to make the infringement of their bye-laws punishable by fine.

It appears clear, therefore, that we must see what was contained in the bye-law of the Kasur Committee. *Punjab Gazette*, November 8th, 1894, Notification No. 594, gives the bye-law :—

“ Any person who intends to build or re-build any house in a public street shall apply to the Committee in writing. The application must be accompanied by a plan showing the depth of the foundation and the plinth upon which the floor of the lower storey (*sic*) is to be built. The application shall state the detail of buildings to be constructed and of materials to be used, as well as the name of the *mohalla*, the direction of the public street and the boundaries of the building.” Immediately after this “ appears Penalty for infringement of bye-laws, (section 145).”

Now, it is clear that the Kasur Committee's bye-law contains very little of what is in section 92 of the Act and contains no mention of the six weeks period. No doubt, the Committee considered that under their bye-law, they had six weeks to sanction or refuse the application, but the question is whether petitioner infringed the bye-law as framed. The bye-law required petitioner to submit an application in writing, a plan and so forth, and this he did. As framed, it did not require any more of him. I have mentioned the lack of evidence for the prosecution, and the explanation given by petitioner and his witnesses (petitioner also filed a list of persons who, he alleged, had rebuilt after oral permission had been given, but this list was not proved); but, apart from this, I do not think that petitioner can be held to have infringed the bye-law as framed. I accept the petition, and forward the proceedings to the Chief Court with the recommendation that the Magistrate's conviction and sentence be set aside, and that the fine be ordered to be refunded.

The fine has been paid. Petitioner's counsel informed.

The order of the learned Judge was as follows :—

30th June 1909.

SHAH DIN, J.—As at present advised, I think that the view taken by the learned Sessions Judge is correct. In re-erecting the wall in question within 6 weeks from the date of his application, the accused does not appear to have infringed any bye-law framed by the Municipal Committee such as would bring his case within the purview of section 145 of Act XX of 1891. Non-

compliance with the provisions of the first part of sub-section (4) of section 92 of the Act does not make the petitioner *criminally* liable; it only enables the Committee to issue a notice to him calling upon him to alter or demolish the wall.

Notice should issue to the President of the Municipal Committee.

ORDER OF THE CHIEF COURT.

SHAH DIN, J.—My order, dated the 30th June 1909, admitting this case to a hearing will be read as part of this judgment. After hearing the Secretary of the Municipal Committee of Kasur, I think that the conviction of the accused is erroneous and cannot stand.

The bye-law framed by the Municipal Committee under section 92 of Act XX of 1891, for the breach of which the accused has been prosecuted and convicted under section 145 of the Act, runs as follows:—

“Any person who intends to build or re-build any house in a public street shall apply to the Committee in writing. The application must be accompanied by a plan showing the depth of the foundation and the plinth upon which the floor of the lower storey is to be built. The application shall state the detail of the buildings to be constructed and of materials to be used, as well as the name of the *mohalla*, the direction of the public street and the boundaries of the building.”

Then follows the bye-law laying down the penalty for infringement of bye-laws framed by the Committee under Chapter VI of the Act (section 145):—

“Any person committing a breach of any of the above bye-laws shall be punishable with a fine that may extend to fifty rupees, etc., etc.”

It is not denied that the accused has fully complied with the bye-law framed under section 92, as set out above. What is alleged is, that he has erected the wall in question within six weeks from the date of his giving notice to the Committee under sub-section (1) of section 92, without the Committee having given the necessary sanction in respect of it, and it is urged that he has thereby rendered himself liable to the penalty provided by the supplementary bye-law framed under the provisions of section 145. But the bye-law framed by the Committee under section 92 does not at all make it obligatory on the person

giving to the Committee a notice of his intention to erect or re-erect a building to refrain from so erecting or re-erecting within six weeks from the date of that notice, and there is, therefore, in the present case no breach of a bye-law such as would entail on the accused the penalty specified above. The provisions of sub-section (4) of section 92 cannot be read into the bye-law as framed by the Municipal Committee of Kasur.

I set aside the conviction and sentence, and direct that the fine, if realised, be refunded to the accused.

Revision accepted.

No. 14.

*Before the Hon'ble Mr. A. H. S. Reid, Chief Judge, and
Hon'ble Mr. Justice Williams.*

THE KING—EMPEROR OF INDIA,—APPELLANT,

Versus

FATEH DIN, BALAND KHAN, AMIR KHAN AND BUTA—
(ACCUSED),—RESPONDENTS.

Criminal Appeal No. 632 of 1908.

*Indian Penal Code, section 430—Condition precedent to a conviction—
Criminal Procedure Code, section 417—Object of the section.*

Held, that a condition precedent to a conviction under section 430 of the Penal Code is that the accused has committed mischief, as defined in section 425, and it must be proved that the accused caused the destruction of some property or some such change in any property or in the situation thereof as destroyed or diminished its value or utility, or affected it injuriously.

Held also, that the object of section 417 of the Code of Criminal Procedure is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a retrial and not to obtain opinions of a High Court on abstract points which do not arise on the facts established.

*Appeal from the order of Bakshi Ghazinfar Ali, Magistrate,
1st Class, Lyallpur, dated the 25th June 1908.*

Government Advocate, for appellant.

Fazl Ilahi, for respondent.

The judgment of the Court was delivered by—

12th May 1909.

REID, C. J.—This is an appeal by the Local Government under section 417 of the Code of Criminal Procedure from an acquittal:

The respondents were charged under section 430 of the Penal Code, on the allegation that they had irrigated their land from a Government canal-cut for a period exceeding that allotted to them and had consequently prevented others from irrigating to the extent to which they were entitled on that occasion.

Counsel for the Crown admitted that the record contained no evidence that any damage was done to a crop or any other property, or that the value or utility of any property was diminished or that any property was injuriously affected.

It is, therefore, obvious that the Magistrate had no alternative to acquitting, and that this appeal is worthless and should not have been filed.

A condition precedent to a conviction under section 430 of the Penal Code is, that the accused has committed mischief, as defined in section 425, and it must be proved that he caused that destruction of some property or some such change in any property or in the situation thereof, as destroyed or diminished its value or utility or affected it injuriously. Until such result of the accused's act is established, his intention or knowledge need not be considered, and the mere fact that he has dealt with water does not constitute an offence punishable under section 430.

The object of section 417 of the Code of Criminal Procedure is not to enable the Local Government to obtain from this Court opinions on abstract points which do not arise on the facts established. The object of the section is to enable the Local Government to have a wrongful acquittal converted into a conviction or to have a retrial. The appeal is dismissed.

Appeal dismissed.

No. 15.

Before the Hon'ble Mr. J. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Shah Din.

THE CROWN,—APPELLANT,

Versus

HARNAMA—RESPONDENT.

Criminal Appeal No. 110 of 1909.

Criminal Procedure Code (V of 1898), section 417—Distinction between appeals from acquittals and appeals from convictions.

Held, that although there is nothing in section 417, Criminal Procedure Code, which indicates that an appeal from an acquittal should receive any

different treatment from any other appeal or class of appeals, there is in fact this marked distinction, namely that when an accused has been acquitted by a Magistrate after hearing all the evidence against him, the presumption is that there was at least reasonable doubt and the Appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant, whereas in an appeal from a conviction the benefit of all reasonable doubt has to be given in favour of the appellant.*

Appeal from the order of Shahzada Muhammad Yusuf Khan, Magistrate, 1st Class, Ferozepore, dated the 30th October 1908.

Government Advocate and Beni Pershad, for appellant.

The judgment of the Court was delivered by—

17th July 1909.

ROBERTSON, J.—This is an appeal on behalf of Government against the acquittal of one Harnama, who was charged with an offence under section 307, Indian Penal Code.

Before we proceed to deal with this case or its merits we would like to make clear the principle upon which, we consider, appeals from acquittals should be dealt with.

The law on the subject is contained in section 417, Criminal Procedure Code, which runs as follows:—

“The Local Government may direct the Public Prosecutor “to present an appeal to the High Court from an original “or appellate order of acquittal passed by any Court other “than a High Court.”

There is nothing in that section which indicates that an appeal from an acquittal, allowed in the interests of public safety, peace and order, by the statute law of this country, should receive any different treatment from any other appeal or class of appeals. There is however in fact a very marked distinction and it is this. In all criminal cases, while it is as clearly the duty of the Magistrate and as clearly the interest of the community to convict the guilty as to acquit the innocent, it is thoroughly established, that in all parts of the British Empire an accused is to be acquitted when there is reasonable doubt of his guilt. A mere remote possibility of innocence does not justify a Magistrate in taking the simple and easiest path of least resistance and acquitting a criminal on vague and remote possibilities. When the guilt of an accused is proved to the extent that any reasonable man in the ordinary pursuit of his daily avocations would act on the hypothesis of guilt, a conviction should follow. But when an accused has been acquitted by

* *Vide* 7 P. K. 1904, Cr., to same effect.

a Magistrate after hearing all the evidence against him the presumption is, that there was at least reasonable doubt, and the Appellate Court must be positively convinced that there was no such reasonable doubt, the benefit of all doubt shown to exist being against the appellant whereas, in an appeal from a conviction, the benefit of all reasonable doubt has to be given in favour of the appellant. This appears to us to constitute the only distinction between an appeal from an acquittal, and one from a conviction, but it is one which has certainly considerable practical significance.

* * * * *

We hold no brief for the police, and the Judges of this Bench and the other Judges of this Court have all, from time to time, had with much regret to pass severe strictures on individual cases of misconduct on the part of the police, when such conduct was relevant to the case, and would not hesitate to do so again, should the interests of justice and of the public require it. But we cannot too strongly deprecate indiscriminate attacks upon members of a body of public servants under circumstances in which they are unable to defend themselves, especially when such attacks are not justified by the record.

The police, who are so constantly abused in some of the public prints by certain sections of their own countrymen, have black sheep among them, and members of the Force, to which, as a whole, the public probably owe far more of the peace and comfort they enjoy in their homes than they are at all aware, have at various times been severely condemned by this and other Courts. But they are very far from being all black, and if we have had at times to find fault, there is also the other side to the picture, and cases coming before us often reveal care, painstaking acumen, bravery and devotion to duty of which any Force might be proud. In this particular case we can see no justification for the suggestion that the police extorted the confession. A superior Court is fully entitled to express its opinion upon the conduct, as disclosed by the record, of a subordinate Court on appeal, because the subordinate Court is bound to place everything upon the record, and the Appellate Court can only, and is only entitled, to go by record and is bound to point out and rebuke, if necessary, the shortcomings of its subordinate. But the case of other departments only incidentally connected with the case, and without power of defence is quite different, and they should not be held up to reprobation and odium without the strongest reasons which in this case are non-existent,

As regards discrepancies we could only remark that there are discrepancies of truth as well as discrepancies of falsehood, and that a too minute attention to immaterial discrepancies may lead to much failure of justice alike in the direction of conviction and of acquittal.

In this case, we consider that the crime of the accused is proved against him to the hilt. We accept the appeal, convict the accused under section 325, Indian Penal Code, and sentence him to three years' rigorous imprisonment with three months' solitary confinement.

We do not think that there was any serious attempt or intent to kill Thakar, so we convict only under section 325, Indian Penal Code.

Appeal accepted.

No. 16.

Before the Hon'ble Mr. J. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Shah Din.

THE CROWN,—APPELLANT,

Versus

1. SAMANDAR, 2. NATHU, 3. FAZALDAD, 4. DITTU —
RESPONDENTS.

Criminal Appeal No. 168 of 1909.

The Indian Forest Act, VII of 1878, section 85, clause (b)—Permitting cattle to trespass—Absence of owner at the time of trespass.

Held, that the question whether an owner of cattle is guilty or not of an offence of permitting cattle to trespass under section 25, clause (b) of the Indian Forest Act, 1878, does not depend upon the absence or presence of the owner of the cattle at the moment, but upon the question of fact in each case, namely, did he or did he not in fact permit his cattle to trespass, and the answer will depend upon the whole circumstances of the case.

Appeal from the order of P. D. Agnew, District Magistrate, Rawalpindi, dated the 11th December 1908.

Government Advocate, for appellant.

Gokal Chand, for respondents.

The judgment of the Court was delivered by—

19th July 1909.

ROBERTSON, Offg. C. J.—This is an appeal by the Crown from an acquittal under section 25, Act VII of 1878,

The question before us is simply that of the proper interpretation to be placed upon section 25, clause (b) of the Forest Act (VII of 1878).

It is argued by the learned Government Advocate that under section 25, clause (d), which runs as follows:—“Any person who trespasses or pastures cattle or permits ‘cattle to trespass’ renders all owners of cattle whose animals trespass in a reserved forest criminally liable under the Act for such trespass, wherever such owners may happen to be. He argued that the prevention of such trespass was a duty laid upon all owners of cattle throughout India, and that they could not escape criminal liability by delegating the immediate charge of the cattle to paid herdsmen or drovers. On the other hand, Mr. Agnew, District Magistrate of Rawalpindi, has laid it down that the owner of cattle which trespass cannot be held criminally liable unless he is actually present and in immediate charge of the cattle himself. In support of his contention the learned Government Advocate quoted the following authorities:—

Mayne's Criminal Law pages 249, 251, 253, *Pirag v. Queen-Empress* (1), *Ralla v. The Crown* (2), *Coleman and Mills* (3).

Now, the same remark applies to all these cases. They deal with cases of “special obligation”, such as the management of licensed houses, the liabilities of liquor licenses, and so on, and stand upon a different footing from clauses in Acts of general application. We are quite unable upon any of the authorities quoted to come to the conclusion that the owner of a herd of cattle, in Lahore for instance, who sends them to graze in the Himalayas under competent herdsmen, would be criminally responsible for the trespass of some of the cattle into a reserve in the Murree *tahsil*. There must be a direct responsibility for the particular act of trespass.

But while we take this view, we are equally unable to subscribe to the view that an owner of cattle can never be held guilty of the offence of permitting cattle to trespass, if he is not actually present when the trespass occurs. Indeed it is not too much to say that the mere fact of his absence may in itself constitute the offence. Illustrations are always dangerous and must be taken with all due limitation, but we can imagine the case of a man living on the verge of a reserved forest turning out his

(1) 9 P. R., 1897, Cr.

(2) 19 P. R., 1878, Cr.

(3) XIII Times L. R., 122.

cattle in front of his house, and going off elsewhere in the full knowledge that his cattle would immediately find their way into the reserve, being guilty of an offence under section 25 (b). It appears to us that when the cattle of any owner are found trespassing within a reserved forest in the neighbourhood of his house, *prima facie* he must be held to have permitted the trespass.

He may rebut the presumption; one way of rebutting it might be to show that he had confided his cattle to a reliable herdsman with instructions to keep the cattle out of the reserve. Again an illustration; if it were shown that an owner had on the verge of a reserved forest confided a large number of cattle to the care of small boys with the full knowledge that the boys could not keep them out, and that they were practically certain to go in, his mere absence at the moment of trespass would not absolve him from the charge of committing an offence under section 25 (b). In brief the question whether an owner of cattle is guilty or not guilty of an offence of permitting cattle to trespass does not depend upon his absence or presence at the moment, but upon the question of *fact* in each case, did he or did he not in fact permit his cattle to trespass?

The answer will depend upon the whole circumstances of each case. In a great many cases the question will resolve itself into, did he or did he not take proper precautions to prevent such trespass? This is our view of the meaning and intention of section 25 (b). We accordingly accept the appeal and return the case for decision on its merits in view of the remarks made above. Judgment announced.

Appeal accepted.

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